Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 2006

SHADI BANNA et al.,

PETITIONER,

-vs-

STATE OF OHIO,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
FROM THE COURT OF APPEALS OF OHIO,
EIGHTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether or not it is error for a court of appeals to reverse a trial court's suppression order when such decision was based on factual determinations concerning the credibility of the witness that led to the trial court's conclusion that insufficient evidence and material misrepresentations contained within the warrant affidavit rendered invalid the warrant issued?

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January Term, 2006

SHADI BANNA et al.,

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-vs-

STATE OF OHIO,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI
FROM THE COURT OF APPEALS OF OHIO,
EIGHTH APPELLATE DISTRICT

Petitioners, Shadi Banna and Ala Banna, pray that a Writ of Certiorari issue to review the judgement entry of the Court of Appeals of Ohio, Eighth Appellate District entered in the above-entitled on November 22, 2005.

LIST OF PARTIES

The parties to this proceeding include those listed in the caption as well as Ala Banna, who is also a Petitioner.

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OPINIONS BELOW

The opinion in the Court of Appeals of Ohio, Eighth Appellate District, captioned State v. Banna, Cuyahoga App. No. 84901 and 84902 (May 26, 2005) is unreported and reprinted in the appendix. A Petition for Certiorari in the Supreme Court of Ohio was denied for lack of a substantial constitutional question. The order of the Supreme Court of Ohio declining jurisdiction and dismissing Petitioners' appeal is reported at 107 Ohio St.3d 1408 (2005).

JURISDICTIONAL STATEMENT

The trial court granted the Petitioners' Motion to Suppress on June 23, 2004. The State of Ohio appealed said trial court decision to the Court of Appeals of Ohio, Eighth Appellate District. On May 26, 2005 the Court of Appeals reversed the decision of the trial court. Petitioners filed a notice of appeal and memorandum in support of jurisdiction in the Ohio Supreme Court. On November 9, 2005 the Ohio Supreme Court dismissed Petitioners' appeal and declined jurisdiction to hear the case citing a lack of a substantial constitutional question.

The jurisdiction of this Honorable Court is invoked pursuant to Title 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following Amendments to the United States Constitution:

(A) The Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On September 4, 2003, Ala Banna, Rami Banna and Shadi Banna were named in a Nine (9) count indictment, alleging the following crimes for all three Defendants: 1) Drug Trafficking, with a juvenile specification, with an offense date of July 22, 2003, in violation of Ohio Revised Code (O.R.C.) 2925.03 and O.R.C. 2925.02 (BB)(Counts 1, 3, and 5); 2) Possession of Drugs, in violation of O.R.C. 2923.24 (Count 7). Moreover, Defendant Shadi Banna only was named in Counts 8 and 9 and charged with Drug Trafficking, with a juvenile specification, in violation of O.R.C. 2925.03 and O.R.C. 2925.01 (BB) with an offense date of July 13, 2003.

On July 18, 2003, Cuyahoga County Common Pleas Court Judge Nancy McDonnell issued a search warrant for the premises described as 1434 Ridgewood Drive, Lakewood, Cuyahoga County, Ohio. Judge McDonnell issued a warrant based on information contained in the affidavit of Patrol Officer Dave Carney of the Westlake Police Department Vice/Narcotics Unit. By way of two pre-trial motions, Appellant-Defendants moved the trial court to suppress all evidence seized pursuant to that warrant on the grounds that the warrant affidavit lacked probable cause and contained material misrepresentations, rendering said warrant invalid.

On June 23, 2004, the State of Ohio dismissed the charges against Rami Banna. Thereafter, on June 23, 2004 the trial court conducted a suppression hearing at which time the trial court granted Appellants' motion to suppress. In making this decision, the trial court indicated that it was

"troubled" by the affidavit's lack of indicia as to the reliability of the confidential informant. The trial court was further unconvinced in the reliability of the allegedly incriminating evidence in the affidavit which purported to link the suspected sales in these premises to defendant Shadi Banna, either through surveillance or through the controlled purchase. Finally, the trial court found the affidavit to be misleading because it purported that the informant was kept under constant surveillance during the controlled purchase when no such surveillance actually occurred.

The decision to suppress the evidence was based on the foregoing, and also in large part due to the trial court's determination that the State's primary witness lacked credibility. In summary of his decision to grant suppression, the trial court judge declared, "The officer testified that nothing was left out of the affidavit. We know that's not true. There is plenty left out." In regard to the threshold met by the affidavit, he stated, "the threshold is very low, we're talking about probable cause, more probable than not, what I find here is to be, at best, equivocal."

On June 6, 2005, the Court of Appeals of Ohio, Eighth District, Cuyahoga County, reversed and remanded the trial court's decision stating: "The affidavit contained ample evidence from which the issuing judge could find that there was a fair probability that contraband would be found at the subject premises." The Court of Appeals concluded that, "...neither the affiant's prior knowledge of the reliability of the informant nor the identity of Shadi Banna as the seller were important to the finding of probable cause to issue a search warrant..."

Finding the lack of connection between the Appellants and the alleged drug sales irrelevant for purposes of issuing a search warrant, and holding that a suppression would not be warranted even if the statements in the warrant

affidavit were conclusively false, the Eighth District Court of Appeals reversed the trial court's decision to grant Appellants' motion to suppress. The Petitioners respectfully assert that the Court of Appeals erred in reversing the decision of the trial court and respectfully moves this Honorable Court to grant certiorari and Reverse the Eighth District Court of Appeals and affirm the decision of the trial court.

REASONS FOR ALLOWANCE OF THE WRIT

I. It was error for the Eighth District Court of Appeals in Ohio to reverse the trial court's suppression order in this case when such decision was based on factual determinations concerning the credibility of a witness which supported a finding of insufficient evidence and material misrepresentations contained within the warrant affidavit rendering invalid the warrant issued.

As trier of fact, the trial court judge is in the best position to make a determination as to credibility, veracity, and overall knowledge on which the State's witness based his affidavit. State v. George, 45 Ohio St.3d 325 (1989). The basis of knowledge and the veracity of the person supplying the hearsay information are circumstances that must be considered in determining the value of the information and whether probable cause exists. Id.

Probable cause should encompass not only the reasonable understanding of what inspires suspicion of guilt but the common-sense understanding of the privacy interests protected by the Fourth Amendment of the United States Constitution and Section 14, Article I of the Ohio Constitution. State v. Reniff, 146 Ohio App.3d 749, 755-56 (2001). Facts must be asserted, not conclusions or vague generalizations. State v. Bartless, 119 Ohio App. 483 (1964). Conclusory "bare bones" statements made by the affiant in a search warrant request concerning the nature of the contraband are by themselves insufficient to justify the issuance of such a warrant. Illinois v. Gates, 462 U.S. 213 (1983). Specific information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. Id.

The trial court in the case at hand determined that the warrant affidavit was factually insufficient to support a finding of probable cause on which to issue a valid search warrant. This determination was made based on the totality of the circumstances surrounding the affidavit, the material misrepresentations contained within, and affiant's lack of credibility. The affidavit did not include any statements supporting the reliability or credibility of the CI, nor did it include any statements evidencing previous use and/or knowledge of this informant by Officer Carney or any other members of the Westlake Police Department. The affidavit stated that the affiant contacted Lakewood Police Department Narcotic agents and learned that Appellants are familiar to them from previous investigations. The affidavit does not specify why any members of the Lakewood Police Department are familiar with Appellants nor does it denote the types of investigations which led to this familiarity.

The affidavit stated further that short stay pedestrian traffic was observed at the residence in question and that such pedestrian activity was indicative of drug trafficking. The affidavit, however, fails to state that the affiant never personally witnessed said pedestrian traffic and was never informed of whether or not the Appellant-Defendants were ever present during this alleged pedestrian activity. The affidavit states that the CI was met for purposes of making a controlled purchase and the CI arranged for this purchase over the phone. The affidavit does not state who, exactly, spoke to the informant over the phone. Nor does it state any specifics regarding the alleged drug transaction, such as where and when it was to take place, with whom, and the type and quantity of the drugs and amount of money involved.

In addition to finding insufficient facts to support a finding of probable cause, the trial court determined that the

affidavit submitted by Officer Carney in support of the search warrant contained sufficient misrepresentations to invalidate the warrant issued. For material misrepresentations to exist,

> There must be allegations of deliberate falsehood or reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons...Allegations of negligence or innocent mistake are insufficient. Franks v. Delaware, 438 U.S. 145, 171 (1978).

Suppression is appropriate if the official issuing the warrant was misled by information the affiant knew was false or would have known was false except for reckless disregard for the truth. U.S. v. Leon, 468 U.S. 897 (1984). When a police officer knowingly or recklessly puts false information in an affidavit to mislead the issuing judge or magistrate, any evidence seized pursuant to that search warrant is inadmissible. State v. George, *supra*.

The trial court specifically noted several glaring misrepresentations in Officer Carney's affidavit. First, the statement that Westlake Police knew the informant likely gave the magistrate the impression that Officer Carney could vouch for his/her reliability. Because Officer Carney could not, his statement in the affidavit constitutes a material misrepresentation. Secondly, as stated in regard to the insufficiency of factually supported probable cause, the affidavit implied a time nexus between the Appellant-Defendants presence at the residence in question and short-stay pedestrian activity indicative of drug trafficking.

However, no time nexus was ever actually witnessed by the affiant or any other officer responsible for surveillance of the residence.

Furthermore, there is no verifiable evidence within the four corners of the affidavit which suggest that Appellant-Defendant Shadi Banna actually did make arrangements with the informant to sell marijuana, yet the affidavit makes a statement implying this very allegation. The statement in the affidavit implies personal knowledge on the part of Officer Carney that arrangements were made with Appellant Shadi Banna over the phone, yet Officer Carney's testimony at the suppression hearing that neither he nor the informant could positively identify the voice on the phone prior to the controlled purchase proves otherwise. Additionally, Officer Carney stated in his affidavit that during the controlled purchase the informant was kept under an unbroken chain of surveillance. The affiant unreasonably implies that he himself conducted this surveillance. The affiant fails to state in his affidavit that he was nowhere near the scene of the alleged controlled purchase and could not possibly have personally observed any activity which took place once the informant disappeared from his line of sight. The affidavit also fails to state that much of the controlled purchase unobserved by any surveillance officers.

The affidavit stated further that the CI went to the residence in question and returned later with narcotics which tested positive for marijuana. The affidavit does not state that the narcotics purchased by the informant were purchased from a female rather than either of the two Appellants. Nor does it say that the narcotics were even purchased from the residence in question. The affidavit also fails to include the fact that Appellants were not present at the residence in question at the time of the controlled purchase and that no fingerprints of either Appellant were found on the narcotics

recovered or its package following the controlled purchase.

During the controlled purchase, the informant actually drove his own car back and forth to the residence in question for purposes of completing the controlled purchase. At the suppression hearing, the trial court judge took serious issue with this omission from the affidavit, stating, "What was in the vehicle, more drugs? We don't know what is in that vehicle. There is no indication of who was watching the CI during this period of time." For these reasons the trial court concluded that material misrepresentations and purposeful omissions contained within the affidavit supported suppression of the evidence obtained pursuant to the warrant issued.

The Eighth District Court of Appeals erred in its determination that the warrant affidavit supported a finding of probable cause and did not include material misrepresentations. Generally, with respect to the findings of a trial court, the appropriate standard of review is to determine whether the trial court's conclusions are supported by competent credible evidence. State v. Lloyd, 126 Ohio App.3d 95 (1998). Great deference is given to the trial court's finding of facts. Reviewing courts must independently determine whether the trial court met any applicable legal standards. State v. Williams, 86 Ohio App.3d 41 (1993). In reviewing an affidavit's legal sufficiency, an appellate court may not infer the existence of other facts, beyond the face of the affidavit, which then operate as inferential gap-fillers to help bolster a probable cause determination for which genuine facts are lacking. Facts not included in the affidavit may not be considered in determining whether it establishes probable cause to search. (emphasis added) State v. OK Sun Bean, 13 Ohio App.3d 69 (1983).

Acknowledging the numerous factual omissions,

assumptions, inferences, misrepresentations, and falsehoods included in the warrant affidavit, Petitioners argue that no probable cause can be found within. Based upon the foregoing, Petitioners respectfully submit that the judgement of the trial court to Grant Appellants' Motion to Suppress should be affirmed.

CONCLUSION

For the foregoing reasons, Petitioners, by and through undersigned counsel, hereby respectfully asserts that the petition for writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

107 Ohio St.3d 1408, 836 N.E.2d 1228 (Table), 2005-Ohio-5859

(The decision of the Court is referenced in the North Eastern Reporter in a table captioned "Supreme Court of Ohio Motion Tables".)

1.Supreme Court of Ohio

State

v.

Banna

NO. 2005-1333

November 09, 2005

APPEALS NOT ACCEPTED FOR REVIEW

Cuyahoga App. Nos. 84901 and 84902, 2005-Ohio-2614.
Ohio 2005.
State v. Banna
107 Ohio St.3d 1408, 836 N.E.2d 1228 (Table), 2005-Ohio-5859
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Slip Copy, 2005 WL 1245642 (Ohio App. 8 Dist.), 2005-Ohio-2614CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY

2.Court of Appeals of Ohio, Eighth District, Cuyahoga County.

STATE of Ohio Plaintiff-appellant

v.

Shadi BANNA, et al. Defendants-appellees

No. 84901, 84902.

May 26, 2005.

Criminal appeal from Cuyahoga County Court of Common Pleas Case No. CR-441689, Reversed and Remanded.
William D. Mason, Cuyahoga County Prosecutor, Pinkey S. Carr, Assistant, Cleveland, Ohio, for plaintiff-appellant.
Larry W. Zukerman, Paul B. Daiker, Attorneys at Law, Zukerman, Daiker & Lear Co., L.P.A., Cleveland, Ohio, for defendants-appellees.

JOURNAL ENTRY and OPINION

ROCCO, J.

*1 {¶ 1} The state appeals from a common pleas court order granting a motion to suppress evidence seized during a search of appellees' home pursuant to a warrant. The state urges that there was probable cause to support issuance of the warrant and that the officers executing the warrant relied upon it in good faith. We agree that the affidavit supplied by Detective Carney provided probable cause to support issuance of the search warrant. Therefore, we reverse and remand for further

proceedings.

Procedural History

{¶ 2} Appellees Shadi and Ala Banna and another co-defendant were charged in a nine-count indictment filed September 4, 2003. All three defendants were named in seven of the counts. Counts one, three and five charged them with drug trafficking with juvenile specifications. Counts two, four and six charged them with drug possession. Count seven charged them with possession of criminal tools. Appellee Shadi Banna was also accused in counts eight and nine of the indictment with two additional charges of drug trafficking with juvenile specifications.

{¶ 3} At the prosecution's request, the court dismissed counts eight and nine with respect to appellee Shadi Banna, and counts five and six with respect to appellee Ala Banna. [FN1]

FN1. At the hearing on the motion to suppress, the state asked the court to dismiss all charges against the third co-defendant, and to dismiss counts five and six and eight and nine in their entirety. The record before this court does not disclose the dismissal of the charges against the co-defendant. Furthermore, the court's judgment entry dismissed counts five and six with respect to Ala Banna only; there is no indication that those charges were dismissed with respect to Shadi Banna.

{¶ 4} Appellees' counsel filed a motion to suppress evidence on January 28, 2005, asserting that evidence seized during a search of their home should be suppressed because the search warrant was executed more than three days after it was issued

and because the affidavit submitted to the court to justify issuance of the warrant was insufficient to support a finding of probable cause. A supplemental motion to suppress was filed June 23, 2004. The court held a hearing on the motion on June 23, and on June 29, 2004 issued an order granting the motion to suppress.

{¶ 5} At the hearing on the motion to suppress, the defense called detective David Carney, a narcotics officer with the Westlake Police Department. Detective Carney testified that he executed an affidavit which he submitted to a Cuyahoga County Common Pleas Court judge in support of his request for a search warrant. He also participated in the search of the premises.

{¶ 6} The affidavit stated that detective Carney had reasonable cause to believe that marijuana and/or other controlled substances were located at 1434 Ridgewood Avenue in Lakewood, Ohio, based on the following facts:

{¶ 7} "1. During the first week of June 2003, affiant met with a a confidential informant who is known to the Westlake Police Department. Said informant who is hereafter referred to as CI provided the following information.

{¶ 8} "2. CI states that there currently exists a marihuana trafficking business at the above location which is operated by Shadi Banna. CI states that Shadi Banna lives on Ridgewood Ave. in Lakewood.

{¶ 9} "3. Through his/her association and conversations with Shadi Banna CI knows the following: That Shadi Banna sells marihuana from his 1434 Ridgewood residence.

*2 {¶ 10} "4. Affiant's [sic] contacted Lakewood Police Narcotic Agents and learned that Shadi Banna is familiar to them from previous investigations.

{¶ 11} "5. Police computer checks determined that Shadi Banna is currently residing at 1434 Ridgewood, Lakewood, Cuyahoga County, Ohio.

{¶ 12} "6. Affiant contacted Lakewood Narcotics and Westshore Enforcement Bureau Agents and shared the above information. Surveillance was conducted by said agents who observed Shadi Banna on the above described premises and further observed pedestrian traffic entering said premises and leaving after a short stay.

{¶ 13} "7. In Affiants [sic] training and experience this is indicative of drug trafficking at the above premises.

{¶ 14} "8. Within the past 24 hours Affiant met with the CI for the purpose of making a controlled purchase of marihuana from Shaddi Banna at the above location. Acting on affiant's instructions, CI placed a call to 216-299-7120 at which time arrangements were made for the CI to purchase marihuana from Shadi Banna at the above premises.

{¶ 15} "9. CI was searched and found free of drugs and money. CI was provided with a sum of money in U.S. currency from which the serial numbers were recorded. Acting on instructions CI was kept in constant and unbroken surveillance as he/she went to the above premises. Within 10 minutes CI returned to a prearranged location and handed Affiant purported marihuana. CI was again searched and found free of any other money or drugs.

{¶ 16} "10. Affiant tested the purported marihuana using the NIK field testing procedure with positive results for marihuana a schedule I controlled substance.

{¶ 17} "11. The NIK field test is provided by the Westlake Police Department. And affiant has found it to be accurate when ultimately compared with full forensic laboratory analysis.

{¶ 18} "12. Affiant avers that there is insufficient time for a full forensic analysis prior to effective execution of this search warrant.

{¶ 19} "13. In the experience of the affiant, narcotic drugs are frequently carried or concealed on the persons of people

who are present at locations where drugs are used or kept, or being sold and the size of useable quantities of drugs are small, making them easy to conceal on the person. It is also affiant's experience that drug houses will be occupied by numerous individuals. Some persons will be involved with the direct sales, some with the job of protecting the premises, some with preparing and packaging drugs and some with the collection of the monies generated from illegal activity. It is therefore necessary to search all persons in the premises. {¶ 20} "14. In the experience of affiant, persons who traffic in illegal drugs frequently keep weapons, such as firearms, on or about their person, or within their possession, for use against law enforcement officials as well as other citizens. *3 {¶ 21} "15. Affiant avers that it is urgently necessary that the above premises be searched in the night season forthwith to prevent the above property from being concealed or removed so as not to be found, for the safety of the officers it is easier to approach the premises in the night season." {¶ 22} At the conclusion of the hearing on the motion to suppress, the court indicated that it was troubled by the affidavit's lack of indicia as to the reliability of the confidential informant. The court was further troubled by the lack of evidence in the affidavit to link the suspected drug sales on these premises to defendant Shadi Banna, either through surveillance or through the controlled purchase. Finally, the court found the affidavit was unintentionally misleading when it indicated that the confidential informant was kept under constant surveillance, because the affiant police officer did not personally observe the informant the entire time, but relied on other officers. The court concluded that the evidence in the affidavit was "equivocal," and did not establish probable cause.

Law and Analysis

{¶ 23} In reviewing the sufficiency of the evidence to support issuance of a search warrant, the reviewing court must ascertain whether there was a substantial basis for the issuing judge to conclude that probable cause existed. *State v. George* (1989), 45 Ohio St.3d 325, 329. "[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.' *Illinois v. Gates* (1983), 462 U.S. 213, 236 (quoting *Spinelli v. United States* (1969), 393 U.S. 410, 419).

{¶ 24} "[I]t is clear that *'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' Spinelli*, 393 U.S., at 419." *Gates*, 462 U.S. at 235 (emphasis in original). Probable cause is measured under a totality of the circumstances test. This test was set forth in *Gates*, 462 U.S. at 238-39, as follows: "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

{¶ 25} The affidavit contained ample evidence from which the issuing judge could find that there was a fair probability that contraband would be found at the subject premises. Reduced to its essentials, the affidavit here advised the court that: (1) a confidential informant told the affiant that Shadi Banna was selling marijuana from a home located at 1434 Ridgewood Drive in Lakewood, Ohio, (2) Lakewood police surveillance noted a number of short-term visitors to that home, which was indicative of drug trafficking, and (3) the

confidential informant made a controlled purchase from the premises of a substance later determined to be marijuana. This evidence was enough to demonstrate to the issuing court that there was a fair probability that marijuana would be found at the premises.

*4 {¶ 26} Before both the trial court and this court, appellees argued that there was no evidence in the affidavit connecting Shadi Banna to the drug sales. While this argument might have been valid if the warrant sought was for Shadi Banna's arrest, evidence identifying the perpetrator of a crime is not necessary to justify a search of a location where evidence of a crime may be found. The warrant requested was for the search of the premises, not the seizure of appellee. Cf. *Michigan v. Summers* (1981), 452 U.S. 692. Therefore, it is irrelevant that the affidavit did not connect Shadi Banna to the drug sales.

{¶ 27} Although there was no evidence in the affidavit to demonstrate the affiant's prior knowledge of the veracity of the confidential informant or the basis for his knowledge, the informant's statements were corroborated by the police surveillance and the controlled buy. This corroboration provided sufficient indicia of the reliability and veracity of the informant's statements. *Illinois v. Gates*, 462 U.S. at 242-46.

{¶ 28} At the hearing on the motion to suppress, Detective Carney testified about the details of the controlled buy. He said that he searched the informant and his vehicle before the buy. The informant drove to the subject premises and back again. Detective Carney did not personally observe the informant as he approached the premises with the recorded currency and returned with the drugs, but the informant was under constant surveillance by a surveillance team, and Detective Carney was in continuous radio contact with the team. The affidavit presented to the judge who issued the

warrant did not completely disclose this methodology. However, the variances do not affect the validity of the procedure the police employed for the controlled buy.

{¶ 29} Appellees contend that the warrant is invalid because the affidavit contained deliberately false or misleading statements. In *Franks v. Delaware* (1978), 438 U.S. 154, the United States Supreme Court held that evidence seized pursuant to a warrant must be excluded if the defendant establishes, by a preponderance of the evidence, that the affidavit supporting the warrant contained intentionally or recklessly false statements, without which the affidavit would not support a finding of probable cause. Appellees here contend that the affiant implicitly vouched for the reliability of the confidential informant by stating that the informant was "known to the Westlake Police Department." They also assert that the affidavit implies that Shadi Banna was present at the time drug sales were made, and that arrangements were made for drug purchases from Shadi Banna, although the affiant could not actually verify that Shadi Banna was involved. As noted above, however, neither the affiant's prior knowledge of the reliability of the informant nor the identity of Shadi Banna as the seller were important to the finding of probable cause to issue a search warrant. Therefore, even if we could somehow conclude that these statements were deliberately or recklessly false or misleading, suppression would not be warranted.

*5 {¶ 30} Accordingly, we reverse and remand for further proceedings. This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion. It is, therefore, considered that said appellant recover of said appellees its costs herein.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate

pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, Jr., P.J. and CHRISTINE T. MCMONAGLE, J. concur.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1). Ohio App. 8 Dist.,2005.

State v. Banna

Slip Copy, 2005 WL 1245642 (Ohio App. 8 Dist.), 2005-Ohio-2614

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THE STATE OF OHIO,)

)SS: **JUDGE**

) **CHRIS BOYKO**

COUNTY OF CUYAHOGA.)

IN THE COURT OF COMMON PLEAS

CRIMINAL DIVISION

THE STATE OF OHIO,	)	
	)	
Plaintiff,	)	
	)	
-v-	)	Case No. **CR-441689**
	)	C/A: **84901**
	)	**84902**
ALA BANNA &	)	
SHADI BANNA,	)	
	)	
Defendant.	)	

DEFENDANT'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

WILLIAM D. MASON, ESQ., Prosecuting Attorney,

By: **PINKY CARR, ESQ.,** Assistant County Prosecutor,

On behalf of the Plaintiff;

LARRY ZUKERMAN, ESQ.,

PAUL DAIKER, ESQ.,

On behalf of the Defendants.

Jeniffer Tokar, RMR

Official Court Reporter

Cuyahoga County, Ohio

WEDNESDAY JUNE 23, 2004

MORNING SESSION

- -

THE COURT: We're here on Case 441689, State of Ohio versus Ala Banna and Shadi Banna. Mr. Paul Dailer and Mr. Larry Zukerman are here representing both Defendants.

Miss Pinky Carr is here representing the Sate of Ohio. This matter has been set for trial today. I understand the issue before the Court is a motion to suppress evidence.

The original motion was filed January 20th, 2004 in this case and we just had another motion to suppress evidence filed today, June 23rd, 2004.

Before we proceed, Miss Carr, any opening statements or comments?

MS. CARR: Your Honor, just briefly, I believe that the evidence in this matter speaks for itself. As it relates to the issue concerning the three days, Your Honor, under Criminal Rule 41, Your Honor, that rule states specifically that as relates to the three days for execution of a search warrant, that the date that the warrants is issued shall not be included as well as any Saturday or Sunday.

Therefore, it is the State's position that this warrant was, indeed, executed within three days, actually, it was two.

In addition, Your Honor, as relates to the issue concerning any misstatement in the affidavit as a basis of the warrant, it's the State's position there was no misstatement

and that everything contained in that affidavit was accurate.

So, for those reasons, Your Honor, the State would ask the defense motion to suppress be denied.

THE COURT: Thank you, Miss Carr. Mr. Zukerman?

MR. ZUKERMAN: Your Honor, just as a housekeeping matter, before we proceed, I believe that the State is going to put on the record that they're dismissing some charges with regard to these clients. So, could we do that before we proceed on the motion?

THE COURT: Sure. Ms. Carr, go ahead.

MS. CARR: Sure, no problem.

Your Honor, I don't know if we have the other Defendant present.

THE COURT: You can dismiss without him being present. No prejudice to him by doing so.

MS. CARR: Absolutely.

THE COURT: That is, you are talking about Rami?

MS. CARR: As relates to Defendant who is listed in Counts 1 through 7, Your Honor, the State would move to nolle or dismiss those counts, as relates to those counts.

THE COURT: My understanding Mr. Bradley was representing him?

MR. ZUKERMAN: Yes, Your Honor.

THE COURT: Now, for my purposes, who is Ala and who is Shadi?

MR. ZUKERMAN: Your Honor, this is Shadi.

THE COURT: Thank you; just so I know, that you.

Also there is some more counts to be addressed, Miss Carr.

MS. CARR: That's correct.

And, Your Honor, the State would also move to dismiss Counts 5 and 6 as it relates to the, what the State believes is a typo which is the Propoxipene – no such drug, Schedule IV drug. Because of that error, the State would move to dismiss or nolle Counts 5 and 6.

THE COURT: We also have 8 and 9 that we were discussing.

MS. CARR: That's correct, Your Honor. In addition, Your Honor, the State would move to dismiss Counts 8 and 9 as relates to Defendant Shadi Banna. Those dismissals are pursuant to the direction of the grand jury supervisor, Christine Pesho, P-e-s-h-o.

THE COURT: 1, 2, 3, 4 and 7, which we'll rename as 5 for purposes of our trial.

Mr. Zukerman, does that take care of the housekeeping?

MR. ZUKERMAN: Yes, sir. Thank you, Your Honor.

THE COURT: Do you wish any kind of statement before we proceed with the motion?

MR. ZUKERMAN: No, sir.

THE COURT: Okay. The motion, itself, raises enough issues to go forward, so the State has to proceed.

Miss Carr, you ready to proceed on the motion?

MS. CARR: Yes, Your Honor.

THE COURT: Please call your first witness.

MS. CARR: Your Honor, State calls Detective Carney.

MR. ZUKERMAN: I believe since there is a warrant issued, it's our burden.

THE COURT: Excuse me, you're right. Okay Mr. Zukerman.

MS. CARR: I was going to help you, though.

MR. ZUKERMAN: If you really wanted to help you could dismiss all the counts.

Thank you, Your Honor. At this point in time, we call Detective Carney. We also ask for separation of witnesses in this matter.

THE COURT: I don't think there is anybody else in here, that I can see.

Detective, would you please raise your right hand?

- - -

THE **DEFENDANT, to maintain the issues on his part to be maintained, called as a witness, DAVID CARNEY,**

who, being first duly sworn, was examined and testified as follows:

- - -

CROSS EXAMINATION OF DAVID CARNEY

BY MR. ZUKERMAN:

Q. Good morning, Your Honor, counsel, madam court reporter, Larry Zukerman on behalf of Defendant, Shadi Banna.

Good morning, Detective.

A. Good morning, sir.

Q. How are you today?

A. Good.

MR. ZUKERMAN: Was he sworn?

COURT REPORTER: Yes.

Q. Could you please state your full name for the Court?

A. David Carney.

Q. Could you please spell your last name for the court reporter?

A. C-a-r-n-e-y.

Q. Where do you currently work?

A. City of Westlake Police Department.

Q. And, in what capacity?

A. I work in the narcotics unit with the police department.

Q. How long have you worked there?

A. Approximately three years.

Q. As of this date, you worked there approximately three years?

A. That is correct.

Q. Now, as of the date on which this search warrant was

executed, do you recall that date?

A. No, I don't, not the exact date.

Q. July 22nd of the year 2003, how long had you worked for the City of Westlake in the narcotics unit?

Approximately two, a little over two years, approximately two and a half.

R. How long had you been employed with the City of Westlake?

A. to this date?

Q. As of July 22nd, 2003.

A. Approximately eleven years.

Q. What capacity?

A. Patrol.

Q. As of July 22nd, 2003, were you on patrol nine years and then two years as a detective?

A. As an officer. I'm still considered, I'm still on a patrol pay scale. And, I'm assigned as an officer in the detective bureau, working narcotics.

Q. Do you belong to a union?

A. Yes.

Q. You should talk to your union rep?

A. Yes, I will.

MR. ZUKERMAN: Your Honor, may I approach?

THE COURT: Yes, go ahead.

MR. ZUKERMAN: Thank you, sir.

I'm going to hand you what has been marked for purposes of identification as Defendants Suppression Exhibit A. Could

you take a look at that packet and tell me if you can identify what is contained in that packet?

This is the affidavit for the search warrant and the search warrant for 1434 Ridgewood.

Also, if you keep looking, there is a copy of the inventory description?

A. That is correct.

Q. Can you look at those and tell me if those are true and accurate copies, to the

best of your recollection, first, of the affidavit which you prepared?

A. To the best of my recollection, yes.

Q. And, if you look at page four, it says, affiant. There is a signature line?

A. Yes.

Q. Is that your signature?

A. Yes, sir.

THE COURT: Mr. Zukerman, before we go on, anybody a witness back there?

MR. ZUKERMAN: Is there a witness in this case?

THE COURT: Thank you. Go ahead, Mr. Zukerman.

MR. ZUKERMAN: Thank you, Your Honor.

Q. This is your signature as affiant on this affidavit?

A. Yes, sir.

Q. Below that it says, sworn and subscribed in my presence on

this 18th day of July, 2003?

A. *Yes, sir.*

Q. And then it purports to have the signature of, what I believe to be, Judge Nancy McDonnell. Do you recall taking this to Judge McDonnell?

A. Yes, sir.

Q. Did you present this affidavit to her?

A. That is correct.

Q. And, did she administer an oath to you before you signed the affidavit?

A. Yes, sir.

Q. And, did you go to see her with anybody?

A. No, sir.

Q. You went by yourself?

A. That is correct.

Q. And, you prepared this affidavit for search warrant by yourself?

A. No, sir.

Q. Who prepared this affidavit for search warrant?

A. I work with - -

Q. Sir, just answer the question. Who prepared the affidavit for search warrant?

A. Detective Escalante.

Q. He typed this out for you?

A. He typed it; that is correct.

Q. And, who typed out the search warrant; did Judge McDonnell type out the search warrant?

A. No, sir.

Q. Who typed out the search warrant?

A. Detective Escalante.

Q. He was not with you when you went to Judge McDonnell?

A. No, sir.

Q. Was anybody with you?

A. No, sir.

Q. No prosecutor?

A. No, sir.

Q. So, you took this search warrant with you when you went to see Judge McDonnell?

A. That is correct.

Q. And she signed it as well?

A. Yes.

Q. If you look at the second page of the search warrant, sir - -

A. Yes.

Q. Do you recall witnessing her sign this?

A. Yes.

Q. And then attached to this is Westlake Police Department search warrant inventory list?

A. Yes, sir.

Q. Is your handwriting anywhere on this list?

A. No, sir.

Q. Did you participate in this search?

A. Yes, sir.

Q. Now, if you look at the top, it says, Shadi and Ali Banna, et

al?

A. Yes, sir.

Q. To whom does et al refer?

A. Rami Banna was a third party charged.

Q. Okay. But, this was prepared before you even knew Rami Banna existed, correct?

A. The inventory?

Q. Yes?

A. No.

Q. It was prepared afterwards?

A. It was during the search.

Q. Okay. It says the date of the warrant, July 18th, 2003; is that fair?

A. That is correct.

Q. And then it says the date, time entered into the residence was July 22nd, 2003; is that correct?

A. That is correct.

Q. And that's 1619 which would be 4:19 in the afternoon?

A. Yes, sir.

Q. Time exited July 22nd 2003, 1859. So, that would be one minute before seven p.m.?

A. That is correct.

Q. Now, the affidavit for search warrant, did you have an opportunity to review this after Detective Escalante prepared it?

A. Yes, sir.

Q. And, it's truthful?

A. Yes, sir.

Q. Everything in here is absolutely truthful?

A. Yes, sir.

Q. And, you swore that to Judge McDonnell?

A. Yes.

Q. You swear that to Judge Boyko today?

A. Yes, sir.

Q. No misstatements in here?

A. No.

Q. No omissions in here?

A. No, sir.

Q. Everything that happened as it pertains to your investigation which led to the issuance of this search warrant is contained in this affidavit for search warrant?

A. That is correct.

Q. You left nothing out?

A. No, sir.

Q. Okay. Now, I'd like you to turn to the second page of the warrant – excuse me, second page of the affidavit. Had you ever been to 1434 Ridgewood before this search?

A. To identify the location, yes.

Q. On what date had you been to 1434 Ridgewood?

A. It would have been the week before.

Q. What date is that?

A. I couldn't tell you the exact date.

Q. So, this search warrant , so you were there a week before,

some time a week before, correct?

A. Yes, the week of the 18th.

Q. You were not there the day before the search, were you?

A. The day before?

Q. Yes.

A. I may have driven by but not to the residence.

Q. You just drove by?

A. That would be, that is correct, if I did that.

Q. If you did that: You have no present recollection?

A. I don't recall driving by, no.

Q. I just need to know what happened. I don't want you guessing. I'm sure the Judge, nor Miss Carr wants you guessing, okay, because that doesn't help us. What helps us is the truth.

What date did you go to 1434 Ridgewood Drive, Lakewood, Ohio?

A. To enter the residence, July 22nd.

Q. What date did you drive by that residence before you entered that residence?

A. July 18th.

Q. Okay. That same day?

A. July 18th I was past that residence.

Q. You drove past it?

A. That is correct.

Q. That's all you did?

A. Yes.

Q. Did you drop anybody off at that residence?

A. No, sir.

Q. Did you see anybody walk into that residence?

A. No, sir.

Q. Did you see anybody walk to the front door of the residence?

A. No, sir.

Q. Did you see anybody walk to the back door of the residence?

A. No, sir.

Q. Did you see anybody come from the front door of the residence?

A. No, sir.

Q. Did you see anybody come from the back door of the residence?

A. No, sir.

Q. So, you can't tie in your own observations of anything that happened at 1434 Ridgewood; is that a fair statement?

A. No, sir.

Q. You're saying – you're agreeing with me?

A. No, I'm disagreeing with you.

Q. Okay. You didn't see anybody walk to the front door?

A. I did not.

Q. You didn't see – well, you signed the affidavit, correct?

A. That is correct.

Q. Nobody else signed the affidavit?

A. That is correct.

Q. You didn't see anybody walk to the front door?

A. That is correct.

Q. You didn't see anybody come out of the front door? Correct?

A. That is correct.

Q. You didn't see anybody come out the back door, correct?

A. That is correct.

Q. You didn't see anybody drive up to the residence?

A. I did not.

Q. You didn't see anybody drive away from the residence?

A. I did not.

Q. You didn't see anybody walking near the residence?

A. That is correct.

Q. Okay. But, this is your affidavit?

A. That is correct.

Q. Now, if we look at paragraph six of your affidavit, sir – excuse me -- we look at paragraph two, you have CI states that there currently exists a marijuana trafficking business at the above location which is operated by Shadi Banna. CI states that Shadi Banna lives on Ridgewood Avenue in Lakewood.

Had you ever met Shadi Banna?

B. No.

Q. Did you ever talk to Shadi Banna?

A. No.

Q. Had you had any conversation with Shadi banna?

A. I, personally no.

Q. Have you had any interaction with him whatsoever?

A. No.

Q. Okay. Now, you say you used a CI here?

A. That is correct.

Q. Is there anything in this affidavit that says you previously used this confidential informant to provide you with information? Look at the whole affidavit.

A. No, sir.

Q. Is there anything in this affidavit that even concludes that the confidential informant, upon which you purportedly rely, is even reliable? Is that even stated in here?

A. No, sir.

Q. Is there anything in this affidavit that says that this confidential informant, upon which you rely, has verified, proven true, what he or she had said to you? Anything in this affidavit?

A. Not in the affidavit, no, sir.

Q. So – and, you didn't give any extra judicial statements to Judge McDonnell when you went to get this search warrant, did you?

A. No, sir.

Q. Okay. So, in other words, you didn't try and give her more information than contained in this affidavit, did you?

A. No, sir.

Q. Now –

A. Sir, I did make a mistake. Paragraph four, I did contact Lakewood Police Narcotics.

Q. I didn't ask you if you contacted Lakewood Police.

A. You asked if I verified the information.

Q. No, I asked you if anything about this informant, if you ever verified information. Did you ever verify information about this informant?

A. No, sir.

Q. Thank you. That's the question I asked you, but I appreciate that. We're going to get to that next, okay?

A. Yes, sir.

Q. Paragraph four, it says nothing about Shadi Banni having anything to do with selling drugs, does it?

A. That is correct.

Q. It has nothing to do with marijuana being sold at 1434 Ridgewood Drive, does it?

A. That is correct.

Q. It has nothing in there that drugs are even being sold there, does it? Yes or no. Paragraph four.

A. No, sir.

Q. Nothing to do with, that there is any traffic of people going in and out of the house, does it?

A. Paragraph four, no, sir.

Q. Okay. Now, paragraph six says you contacted Lakewood Narcotics and Westshore Enforcement Bureau agents and shared information with them, correct?

A. That is correct.

Q. Surveillance was conducted by said agents who observed Shadi Banna on the above described premises and further observed pedestrian traffic entering said premises and leaving after a short stay, correct?

A. That is correct.

Q. Okay. But, it doesn't say what time these observations occurred; does it?

A. That is correct.

Q. Doesn't say when these observations occurred, does it?

A. That is correct.

Q. It doesn't say who came or who left, does it?

A. That is correct, sir.

Q. I mean, you went into the house on July 22nd, 2004 correct?

A. Yes, 2003.

Q. I'm sorry, 2003, thank you for correcting me.

How many people were in the house; do you remember? A lot of people, right?

A. Four, that I recall.

Q. Four people in the house?

A. That I recall.

Q. How many people were on the front porch?

A. I apologize. There were three in the house that I recall. I'm sorry, you're correct.

Q. I mean, I got pictures of eight people that you have handcuffed. So, do you want to go through those? Does this now refresh your recollection? There were a lot of people in

the house, correct?

A. That is correct.

Q. Lot of neighbors walking about?

A. That is correct.

Q. Busy neighborhood?

A. With pedestrian traffic, that is correct, very.

Q. So you didn't do any surveillance, did you, except for the drive-by one on the 18th, correct?

A. That is correct.

Q. So from what we know from your personal observations, you didn't see anything happen either, correct?

A. That is correct.

Q. So then we go down to paragraph seven which then concludes, in your training and experience, this is indicative of drug trafficking at the above premises, correct?

A. That is correct.

Q. Okay. But, what we have here is an informant whose reliability or verifiability is not set forth in this affidavit, correct?

A. That is correct.

Q. Okay. And, you say that Shadi Banna lives on Ridgewood Avenue in Lakewood, Ohio, correct?

A. Yes.

Q. How do you know that? Did you go knock on the door?

A. No, sir.

Q. Did you check his mail?

A. No, sir.

Q. Did you ask if he lived there?

A. No, sir.

Q. Did you run his driver's license ID?

A. Yes, sir.

Q. It had that address?

A. That is correct.

Q. So you concluded from that that he lives there?

A. It is the only address that I could find that belonged to Shadi Banna.

Q. You say that he lives there, correct?

A. That is correct.

Q. Did you go to the recorder of deeds office to see if he owns any other property?

A. No, sir.

Q. You know he owns and lives in a house in North Ridgeville?

A. No.

Q. You didn't bother to go check a verifiable source where it actually tells you what property people own and where they live, correct?

A. I did not.

Q. And then you list a lot of other information that really has nothing to prove or disprove whether he lives there or whether he did anything; is that a fair statement? You got no proof he sold drugs out there, do you?

A. Yes, sir.

Q. You have proof he sold drugs out of that house?

A. Exactly how his deals were taking place, yes, sir.

Q. Did you ever set up a buy there?

A. Yes, sir.

Q. Did he ever sell drugs there? Did he ever sell drugs there, yes or no?

A. Hand to hand, no.

Q. You say that there was a call to a cell phone number, correct?

A. That is correct.

Q. And you have a tape recording of that call, correct?

A. No, sir.

Q. you monitored this phone call, didn't you?

A. That is correct.

Q. You have it in your notes from it?

A. I have to check my case file, sir.

Q. You want to do that?

A. Sure.

MR. ZUKERMAN: Judge, may he?

THE COURT: Sure, go ahead.

MR. ZUKERMAN: Could we have his notes marked, Your Honor?

THE COURT: Yes, sir.

MR. ZUKERMAN: I'd like to mark this B, please.

MS. CARR: Your Honor, I object to having the notes marked in that it's part of this case file. He's just basically using them to refresh his memory. Question was posed by defense counsel as to whether or not a conversation took place. He indicated he needed to refer to his notes. He has done that by refreshing his memory. I don't think it's

anything that should be admitted into evidence.

THE COURT: Well, we're not taking his notes and giving them to a jury at this time. He can use it for purposes of identification at this point.

Mr. Zukerman, you may proceed.

MR. ZUKERMAN: Thank you, Your Honor. May I approach?

THE COURT: Yes.

MR. ZUKERMAN: Thanks. For purposes of this hearing, we're going to mark it Exhibit B. Just so we're clear, there is no mistakes, we'll put suppression on here.

Q. Now, having looked at your notes, your notes refresh your recollection?

A. Yes, sir.

Q. No, had you ever – you said you never talked to Shadi Banna?

A. That is correct.

Q. Were you listening on the phone here with the other person?

A. Yes, sir.

Q. Did you recognize the voice on the other line?

A. No, sir.

Q. So, you couldn't identify the person as Shadi Banna who was on the phone?

A. No, sir.

Q. And when did this conversation take place?

A. This would have been on the 18th.

Q. July 18th?

A. That is correct.

Q. Was this before or after you drove by the house?

A. This would have been before.

Q. Okay. And, did you see Shadi Banna at that house?

A. No, sir.

Q. Did you see his car there?

A. No, sir.

Q. Did you ever see his car there?

A. I, personally, no, sir.

Q. Okay. So you can't identify the person who your confidential informant had a conversation with, can you?

A. Only by what my informant told me, his phone number, that is correct.

Q. But, you can't you're the one - -

A. No, sir.

Q. You're the one - - nowhere in this affidavit does it say that the informant identified this person as Shadi Banna, does it?

A. Correct, sir?

Q. Okay. So, nowhere in this affidavit, I mean, your testimony is you can't identify the person on the other end as Shadi Banna, correct? You don't have to look at that. Your testimony, you can't identify the voice as being Shadi Banna?

A. Not the voice, no, sir.

Q. This affidavit does not identify the person on the other end as being Shadi Banna, does it? Nowhere in this affidavit does

this say that your informant identified the person on the other end of the phone as Shadi Banna, correct?

A. That is correct.

Q. Okay. Now, did you drop the informant off at 1434 Ridgewood?

A. No, sir.

Q. Were you the handler for this informant?

A. Yes, sir.

Q. Where did you drop the informant off at?

A. The informant was, had driven there and was passed from agent to agent to keep constant surveillance on him.

Q. I'm just talking about you, because you're the affiant here.

A. That is correct.

Q. Did you drop the informant off at 1434 Ridgewood?

A. No, sir.

Q. Did you search the informant to see if the informant was found free of drugs and money?

A. Yes.

Q. Did you provide the informant with a sum of money in US currency?

A. Yes.

Q. Was the informant, did you record the numbers?

A. Yes.

Q. Did you keep in constant and unbroken surveillance when the informant went to the premises? Did you?

A. No, I did not.

Q. And when the informant returned, did you, did the informant

return to your car or another car?

A. I don't understand. What exactly do you mean?

Q. When the informant came back with marijuana - -

A. Yes.

Q. Did the informant come to your car or to another car?

A. The informant returned to me.

Q. Where were you parked?

A. Approximately three blocks away.

Q. You were parked – so, they live on the north part of Ridgewood, near Detroit?

A. That is correct.

Q. On the west side of the street?

A. That is correct.

Q. And you were three or four city blocks further south?

A. No, I was north.

Q. North?

A. From what I recall.

Q. You can't be three blocks north. I mean, you were on the other side of Detroit?

A. Approximately a block north, to the rear of the Lakewood Police Department.

Q. You were in the rear of the Lakewood Police Department?

A. From what I recall.

Q. You couldn't see this person come in and out of the house; it would have been impossible?

A. That's correct.

Q. Okay. So, basically, the person walked back to the Lakewood Police Department?

A. No, sir.

Q. Somebody picked the person up, transported them back to Lakewood?

A. No, sir.

Q. How did the person get back?

A. Person drove.

Q. So, you didn't see where that person went from the time they purportedly went to the Banna residence to the time they came back to you, correct?

A. I did not, no, that is correct.

Q. You did not even see this person drive to the Banna residence, did you?

A. That is correct.

Q. Okay. And, in this affidavit, there is nothing about you searching this person's car before they went to the Banna residence, is there?

A. The vehicle was searched when the informant was searched.

Q. Okay. But, that's not in this?

A. That is correct.

Q. We're just dealing with the affidavit.

A. That is correct.

Q. There is nothing in this affidavit that shows that the vehicle was searched?

A. That is correct, the specific vehicle, no, sir.

Q. And there is nothing in here to show that the informant was

searched afterwards, correct?

A. That is correct.

Q. And there is nothing in here to show that the informant's person was searched afterwards, correct?

A. That is correct.

Q. And from reading this affidavit, it appears that this is all in the first person, that you did all this correct?

A. No, sir.

Q. It says, CI was searched, found free of drugs and money, correct?

A. That is correct.

Q. It didn't say other people searched, does it?

A. No, sir.

Q. Okay. And, it indicates in here that CI was kept in constant, unbroken surveillance as he went to the above premises, correct?

A. No, sir.

Q. No?

A. No, sir.

Q. In fact, what we know is you did not keep the informant in constant and unbroken surveillance as he/she went to the above premises, correct, because you weren't anywhere near there, correct?

A. That's correct.

Q. It says, within ten minutes - - you have no idea where this person, went, do you? You have no personal knowledge where this informant went, do you?

A. The person was kept in surveillance.

Q. You didn't keep the person in surveillance?

A. Correct.

Q. And you're the affiant here?

A. That is correct.

Q. You have no idea where this person went, do you, on the 18th day of July, 2003?

A. Personally came to me.

Q. You didn't see where the person went to or came from?

A. I did not, no.

Q. Thank you, sir. And, did you field test this marijuana?

A. Yes, I did.

Q. And, did you also submit it for full forensic laboratory analysis?

A. I have to check my notes, sir. Sir, I think Detective Escalante actually did the submission.

Q. Was this informant wearing a wire?

A. Yes, sir.

Q. And, the conversations were recorded?

A. Yes, sir.

Q. Who recorded these conversations? This is the first I've heard of this. Who recorded this conversation?

A. From what I recall, it was recorded by Westshore Enforcement Bureau.

Q. Where are these tapes?

A. That, I do not recall, sir. Everything tat we have was turned over.

Q. You turned the tapes over to the prosecutor's office?

A. To the prosecutor's office.

Q. Now, is there anybody who can identify Shadi Banna as being 1434 Ridgewood, Lakewood, Ohio, on the 18th day of July, 2003?

A. No, sir.

Q. Is there anybody who can state definitively that the drugs which were given to you came from Shadi Banna from that residence? I'll withdraw the question.

A. According - -

Q. I'll withdraw. Is there anything in this affidavit here that says that the drugs came from Shadi Banna?

A. No, sir.

Q. Is there anything in this affidavit here that says that the informant purchased these drugs from Shadi Banna at 1434 Ridgewood Avenue in Lakewood, Ohio?

A. No, sir.

Q. So, you will agree with me that there is nothing in this affidavit, factually, that ties any marijuana to the residence at 1434 Ridgewood, Lakewood, Ohio?

A. No, sir, I don't agree with you.

Q. Okay. Where in this does it say that the CI purchased the drugs from Shadi Banna? Just point that out to me. That's all I'm asking.

A. Paragraph eight explains that the CI - -

Q. No, no, sir. Where does it say that the drugs were purchased from Shadi Banna? Just tell me.

A. It does not.

Q. Where does it say that the drugs were purchased from 1434

Ridgewood, Lakewood, Ohio?

A. Paragraph nine.

Q. Where does it say that?

A. It doesn't say anything about the drugs being purchased from 1434 Ridgewood.

Q. It says that the person went to the premises, right?

A. That is correct.

Q. Doesn't say what happened at the premises, does it?

A. That is correct.

Q. Doesn't say that you saw this person go into the house, does it?

A. That is correct.

Q. Doesn't say that you saw this person meet with anybody, does it?

A. That is correct.

Q. And it doesn't even say they saw the person leave from the residence, does it?

A. That is correct.

Q. Doesn't say anything about what happened to the person afar he or she went to the above premises, does it?

A. That is correct.

Q. In fact, from looking at this affidavit, we have no idea what happened from when the person went to the premises to when, ten minutes later, returned to the prearranged location and handed you purported marijuana?

A. From that specific paragraph, no, sir.

Q. Okay. Well, show me where it says that she purchased

marijuana or he purchased marijuana from that location. Show me; show the Court.

A. Paragraph eight.

Q. Mm-hmm?

A. It explains, arrangements were made to purchase the marijuana from Shadi Banna at the above premises.

Q. Mm-hmm.

A. The above premises being 1434 Ridgewood, Lakewood.

Q. Where, in this, does this state on the 18th day of July, 2003, that this person purchased the marijuana from Shadi Banna?

A. It does not.

Q. Where in this affidavit does it say that this person purchased the marijuana from this residence or obtained it, even, from this residence?

A. Where? I just explained to you.

Q. I understand what you're trying to extrapolate, but you're not answering the question. The question is, where does it say that the CI told you that she purchased the drugs or he purchased the drugs from Shadi Banna? It's not in there, is it?

A. Hand to hand, no.

Q. Where does it say, I purchased it from Shadi Banna, that the CI purchased it from Shadi Banna on the 18th day of July, 2003? Where does it say those words? Would you agree with me it doesn't?

A. That is correct.

Q. Thank you. And, where does it say in there that the drugs even came from 1434 Ridgewood, just from your own informant? It doesn't say that, does it?

A. It explains the arrangements.

Q. Sir, where does it say that the drugs came from 1434, that the confidential informant told me that the drugs which I took from this person came from 1434 Ridgewood? Does it or doesn't it? It doesn't does it, sir? It doesn't say where the drugs came from, does it, sir?

A. I think it explains it in paragraphs eight and nine.

Q. Where does it say that the drugs were provided to the confidential informant at 1434 Ridgewood? Just show me those precise words.

A. Those precise words are not in this.

Q. Would you agree with me this affidavit does not say that the informant told me that Shadi Banna gave me the drugs?

A. Those words are not in this affidavit.

Q. would you agree with me that the words, the confidential informant told me that they tot the drugs from 1434 Ridgewood, are not in this affidavit? Is that fair, sir?

A. I'm sorry, can you repeat that?

Q. Sure, I can repeat that. Is it fair to say that nowhere in this affidavit does it say where the informant told you or anybody where he or she got the drugs? It's not in the affidavit, is it?

A. I think it explains it.

Q. I'm not a king - - no, it doesn't. I understand your frustration with the ineptness with which this wad drafted; however, I want to get to the truth of the matter here, sir. And, the truth is that nowhere in this affidavit does it say that upon the confidential informant's return to you, the handler, did the confidential informant say that he or she obtained the drugs from 1434 Ridgewood, correct?

A. Those words, no, sir.

Q. Okay. And, in fact, what we know is we have no idea where this person went after they went to the premises, correct?

A. That's incorrect.

Q. Nowhere in that affidavit. That's what we're looking at.

A. No, sir, not in the affidavit.

Q. In fact, in reading this affidavit, one would be led to conclude that this person actually purchased the drugs from Shadi Banna, correct, at 1434 Ridgewood?

A. No hand to hand is explained in this affidavit.

Q. Sir, isn't it a fact that Shadi Banna was not at 1434 Ridgewood Drive on July 18th, 2003?

A. That's correct.

Q. Is it not correct that he did not sell any marijuana on July 18th, 2003, correct?

A. That's incorrect.

Q. He was not there, was he?

A. He was not.

Q. Did not give anybody any marijuana that you know?

A. Hand to hand, no, sir.

Q. And, who did he give it to?

A. His sister to sell.

Q. Okay, which sister?

A. Sister was identified as Hanin El Banna.

Q. Where in this affidavit does it say that somebody other than Shadi Banna sold the drugs?

A. That's not in the affidavit.

Q. Okay, it's not in there. Where does it say in the affidavit that

Shadi Banna was not on the premises on July 18th, 2003? It's not in there, is it?

A. That is correct.

Q. Because that would sort of hurt your case, ha?

MS. CARR: Objection, Your Honor.

THE COURT: Sustained.

MR. ZUKERMAN: I'm sorry, officer, forgive me. I withdraw that.

R. In this affidavit, you didn't tell Judge McDonnell the truth, did you?

A. Yes.

Q. You didn't say, hey, Shadi Banna wasn't there, did you? Did you? Yes or no, sir. Yes or no.

A. No. In the affidavit, it does not specify that he was not at the residence.

Q. And, in the affidavit, it doesn't specify that he didn't even sell the marijuana, does it?

A. Hand to hand, no sir.

Q. And, well, did you see him there?

A. I did not, sir.

Q. Did you ever see him before? You never arrested him, did you?

A. No.

Q. Did you ever see him before today?

A. Only photos.

Q. Okay. So, you're assuming he set up this transaction, correct?

A. No, sir.

Q. You know he did?

A. Yes, sir.

Q. You identified his voice on the other end of the phone?

A. No, sir.

Q. Okay. Do your notes indicate on July 18th, 2003 it was not Shadi Banna or that Shadi Banna was not at that residence?

A. No, sir.

Q. Do your notes indicate that he didn't sell the marijuana to anybody?

A. No.

Q. Did you do any tests - - how was the marijuana sold, what type of packaging?

A. I would have to see the packaging at this time.

Q. Cut to the chase. Did you ever do any type of forensic testing on the packaging to determine if his fingerprints were on the packaging?

A. From that purchase?

Q. Yes, sir.

A. I'd have to look at the submission form. I don't think prints were lifted from BCI from any packages.

Q. Were they submitted to BCI?

A. Yes.

Q. Was this submitted to BCI?

A. Yes.

Q. Were any of Shadi Banna's fingerprints found on any of these items?

A. It's my understanding no prints were found.

Q. Now, are you familiar with the indictment that was issued in this case?

A. I haven't read the indictment, no, sir.

MR. ZUKERMAN: May I approach, Your Honor?

THE COURT: Sure.

MR. ZUKERMAN: Thank you.

Q. I'd like you to specifically look at Counts 8 and 9 and the dates, please.

MS CARR: Your Honor, I'm going to object in that it's the State's understanding from the beginning of these proceedings, we noiled or dismissed Counts 8 and 9. I thought that was the purpose of doing that at the beginning prior to our proceeding for this suppression hearing.

THE COURT: Mr. Zukerman, you want to explain?

MR. ZUKERMAN: I'm just using this for date of reference, sir.

THE COURT: Okay, you can use it for date of reference.

MR. ZUKERMAN: That's all, sir.

MS. CARR: I'm sorry, Your Honor, I'm up again. I'm sure defense counsel will agree that's a typo error in the indictment because actually it has July 13tgh.

MR. ZUKERMAN: I don't know that there is, but thank you for telling the witness the answer to

the question.

MS. CARR: I'm sorry.

THE COURT: Let's find out. You can use this as a point of reference.

R. Officer Carney, have you had an opportunity to review the indictment?

A. Yes, sir.

Q. And, have you had an opportunity to review the dates on which the events about which you just testified are alleged to have occurred by the State of Ohio?

A. On the indictment, yes, sir.

Q. Okay. And, what is the date of the offense about which you just testified as alleged in the indictment?

A. As alleged in the indictment, the 13th.

Q. Not the 18th as you testified today?

A. That's correct.

Q. Are you wrong or was the indictment wrong?

A. The indictment is incorrect. That date is incorrect.

MR. ZUKERMAN: Your Honor, may I have one second, please?

THE COURT: Go ahead.

Q. May I see your notes, Exhibit B? In looking at your notes, did you have any personal knowledge about the information in your notes? Were you at the scene when any of this went down on July 18th, 2003? You were not, were you?

A. At the residence, no, sir.

Q. Okay. And, again, in looking at paragraphs eight, nine, ten, eleven, these appear to all have been witnessed by you,

correct, it doesn't attribute these observations to anybody else, does it?

A. That's correct.

Q. Okay. So, for somebody reading this affidavit, it would appear to then that this all came from the affiant's personal knowledge, correct, you?

A. Yes. I did not - - yes.

MR. ZUKERMAN: Thank you, Your Honor. Thank you, Officer. I have no further questions.

THE COURT: Thank you, Mr. Zukerman. Miss Carr?

MS. CARR: Thank you, Your Honor.

- - - -

-DIRECT EXAMINATIO OF DAVID CARNEY

BY MS. CARR:

Q. Detective Carney, how are you?

A. Good, thank you.

Q. Good. Now, Detective, you testified that as relates to the search warrant, you obtained the search warrant with the assistance of Detective Escalante; is that correct?

A. That's correct.

Q. Who is Detective Escalante employed by?

A. City of Westlake Police Department.

Q. And, in your eleven years of experience in investigating drug cases, how many search warrants have you obtained?

A. Approximately five to ten.

Q. And during the times that you have obtained search warrants, is that the normal protocol; they're typed at your department and then signed off by the Judge?

A. That's correct.

Q. And, that's just normal procedure and protocol, is that correct, at your department?

A. That is correct.

Q. And, that same procedure and protocol was followed in this case; is that correct?

A. That's correct.

Q. Now, as it relates to the search warrant, itself - -

MS. CARR: Your Honor, if I may approach?

THE COURT: Sure.

MS. CARR: Your Honor, if the Court will take judicial notice this is a 2003 calendar. The month at issue, July, which is in the top, left hand –

MR. ZUKERMAN: We'll stipulate to the authenticity of the dates; however, I don't know about the authenticity of the calendar. But, we will stipulate to the dates.

THE COURT: Okay.

R. Detective, I'm handing you what I have just marked as State's Exhibit No. 1. Would you please identify that?

A. it's an August calendar, July and September.

Q. what year?

A. 2003.

Q. Okay. And, are you aware that we're discussing events here

today that occurred in July, 2003?

A. Yes.

Q. And, Detective, directing your attention to the top left hand corner of State's Exhibit No. 1, what is in the top left hand corner?

A. There is a July, 2003 calendar.

MR. ZUKERMAN: Your Honor, we'll stipulate that the dates are the dates on which these events occurred; that it was issued on a Friday; that Saturday was the 19th, Sunday the 20th and Monday was the 21st and search occurred on the 22nd which was a Tuesday. We stipulate that.

THE COURT: Thank you. Stipulated to, Miss Carr.

MS. CARR: Okay.

THE COURT: You can move on.

MS. CARR: All right.

Q. And, Detective, according to the search warrant that was signed off by Judge McDonnell, that search warrant was supposed to be executed in the night season , is that correct?

A. that's correct.

Q. And what time was that search warrant actually executed?

MR. ZUKERMAN: We stipulate the time it was executed as that's been testified to on direct.

THE COURT: Counsel, let me see counsel at side-bar.

(Thereupon side-bar had off the record.)

THE COURT: Mr. Zukerman, you initially raised in your motion, an issue regarding three days

for the search warrant to be executed. You wish to comment on that now?

MR. ZUKERMAN: We're going to rely, we're going to stay within the confines of the four corners of the affidavit itself.

THE COURT: Thank you, Miss Carr. Move on.

MS. CARR: Thank you, your Honor. Thank you, counsel.

R. Now, Detective, is it routine in, prior to executing search warrants, that you normally drive by the residence the day before execution?

A. That's correct.

Q. And, did you follow that routine or protocol in this case?

A. Yes.

MR. ZUKERMAN: Objection. He testified he had no recollection.

THE COURT: That's what I recall the testimony having been.

MS. CARR: Your Honor, if I'm not mistaken, he testified that he drove by. I thought that was the reasoning we got his notes. He drove by the day before but he didn't go in. But, he did say he drove by the day before.

MR. ZUKERMAN: Testimony was he had no recollection other than what occurred on the 18th and 22nd.

THE COURT: That's what I have. Detective, you want to clarify that?

THE WITNESS: Yes. I could not

specify an exact date. I was by the residence numerous times the week before. And, the day before is usually protocol.

MS. CARR: Okay.

THE WITNESS: I can't specify. It's not in my report.

Q. All right. Then, Detective, drawing your attention to Defense Exhibit No. A, the affidavit, directing your attention to that, if you could place that in front of you.

A. Yes.

Q. Now, as it relates to the CI, drawing your attention to paragraph number one of the affidavit, you are the affiant in this affidavit; is that correct?

A. That's correct.

Q. And in Defendant's Exhibit A, you stated, paragraph number one, that you personally met with this CI; is that correct?

A. That's correct.

Q. And that he was known not personally to you but to Westlake Police Department?

A. That is correct.

Q. Is there anywhere in paragraph number one where it states that you personally know the CI?

A. No.

Q. Okay. But, he is known to the police department that you're employed by; is that correct?

A. That's correct.

Q. Now, as relates to paragraph number two, that information that a marijuana trafficking business at the location contained within this affidavit, 1434 Ridgewood in Lakewood, Ohio,

marijuana was being sold by the Defendant, Shadi Banna, that was information provided directly to you by the CI; is that correct?

A. That's correct.

Q. And, that's in paragraph number two, right?

A. Not that exact address. The exact address is in paragraph number three.

Q. Right.

A. Yes.

Q. And the exact address is also on page one of the affidavit as well, correct, 1434 Ridgewood?

A. Yes.

Q. Okay. And that the CI stated to you, personally, that this Defendant, the seller of the marijuana, lives on Ridgewood Avenue in Lakewood, Ohio?

A. That is correct.

Q. Okay. And that the CI knows Shadi Banni; is that correct?

A. That's correct.

Q. In paragraph number three?

A. That's correct.

Q. And that he sells marijuana from this residence, 1434 Ridgewood, this is paragraph number three?

A. That is correct.

Q. And that as it relates to paragraph number four, you, not someone else, personally contacted the Lakewood Police Department; is that correct?

A. That's correct.

B.

Q. And that he was known not personally to you but to Westlake Police Department?

A. That is correct.

Q. Is there anywhere in paragraph number one where it states that you personally know the CI?

A. No.

Q. Okay. But, he is known to the police department that you're employed by; is that correct?

A. That's correct.

Q. Now, as relates to paragraph number two, that information that a marijuana trafficking business at the location contained within this affidavit, 1434 Ridgewood in Lakewood, Ohio, marijuana was being sold by the Defendant, Shadi Banna, that was information provided directly to you by the CI; is that correct?

A. That's correct.

Q. And that's in paragraph number two, right?

A. Not that exact address. The exact address is in paragraph number three.

Q. Right.

A. Yes.

Q. And the exact address is also on page one of the affidavit as well, correct, 1434 Ridgewood?

A. Yes.

Q. Okay. And that the CI stated to you, personally, that this Defendant, the seller of the marijuana, lives on Ridgewood

Avenue in Lakewood, Ohio?

A. That is correct.

Q. Okay. And that the CI knows Shadi Banna; is that correct?

A. That's correct.

Q. In paragraph number three?

A. That's correct.

Q. And that he sells marijuana from this residence, 1434 Ridgewood; this is paragraph number three?

A. That is correct.

Q. And that as it relates to paragraph number four, you, not someone else, personally contacted the Lakewood Police Department; is that correct?

A. That's correct.

Q. And is it accurate to say that this address, 1434 Ridgewood is located in the City of Lakewood?

A. Yes.

Q. Would that be the reason that you contacted the Lakewood Police?

A. That is correct.

Q. All right. And, instead of just taking the CI's words - -

MR. ZUKERMAN: Objection. She's cross-examining the witness. It's her direct. It's my burden I have; I can do cross. Under Article IV of the rules of evidence, she must, she may not lead a witness, Your Honor.

THE COURT: True.

MS. CARR: Okay, no problem.

R. Detective, why did you contact the Lakewood Police?

A. That's the city that Shadi Banna is selling from.

Q. Go ahead. What was your purpose in contacting them?

A. To gather information on Shadi Banna.

Q. And, did you provide the Lakewood Police Department with this address?

A. That's correct.

Q. Okay. And, what did you learn after your conversation with -- who did you speak to, specifically, with the Lakewood Police Department, if you know?

A. Detective Allen.

Q. Detective Allen?

A. yes.

Q. Did you know Detective Allen?

A. Yes.

Q. You worked with him before?

A. Yes.

Q. And is that normal protocol when you have an investigation in a city outside of yours that you contact --

MR. ZUKERMAN: Objection, leading.

THE COURT: Break it down, Miss Carr, please.

R. What is normal protocol when you have a suspect located in a city outside of yours?

A. To contact another agency in which that suspect is selling from resides at or selling from.

Q. Okay. And, in this case, it was the City of Lakewood?

A. That is correct.

Q. And, you testified that you spoke with Detective Allen?

A. That's correct.

Q. Have you worked with Detective Allen before?

A. Yes.

Q. Okay. Over your career, about how many times, if you know?

A. Approximately, anywhere from thirty to fifty.

Q. Okay. And, did you give Detective Allen the address of the location where the marijuana was supposed to be sold?

A. That is correct.

Q. And, based upon your conversation with Detective Allen, was he familiar with this address?

A. Yes.

Q. Tell me about that conversation with Detective Allen.

A. Detective Allen explained he was familiar with Shadi Banna and that address from previous investigations, narcotic investigations.

Q. Okay. And was there anything else, anything else in this conversation with Detective Allen - - did you learn anything else?

A. Shadi Banna is known to sell narcotics from that location.

Q. Okay. And, at this time, were you able to obtain a picture of the Defendant, Shadi Banna?

A. Yes.

Q. And, how did you obtain that picture?

A. Through the KRIS computer system.

Q. Okay. So, you had a photograph of the Defendant, Shadi

banna?

A. That is correct.

Q. At any time did you show this photograph to your CI to verify this was the person that he referred to as Shadi Banna?

A. Yes.

Q. When did you do that?

A. At the time that I brought the photograph up on the computer.

Q. Okay. But, it was prior to?

A. Prior to.

Q. The controlled buy?

A. That's correct.

Q. It was prior to you getting this affidavit, correct?

A. That is correct.

Q. And was the CI able to verify that was indeed Shadi Banna, the person he referred to selling marijuana?

A. Yes.

Q. Now, as it relates to paragraph number six, you contacted the Lakewood Narcotics and Westshore Enforcement Bureau agents; is that correct?

A. That is correct.

Q. What was your purpose in contacting them?

A. To conduct surveillance at that address and to assist in the investigation.

Q. All right. And, is that normal protocol?

A. Yes.

Q. Now, anywhere in paragraph number six does it say that you personally conducted the surveillance?

A. No.

Q. Okay. As relates to paragraph number six, the second line reads that surveillance was conducted by said agents who observed Shadi Banna on the above described premises?

A. Yes.

Q. So at no time, even in this affidavit, four corners, did you state that you personally conducted the surveillance, correct?

A. That is correct.

Q. And also, paragraph number six, it makes reference to the pedestrian traffic. In your experience as a narcotics detective, when there is heavy pedestrian traffic, what does that, if anything, mean to you?

A. It is indicative of drug trafficking.

Q. You've been involved in how many drug investigations, numerous?

A. Yeah, numerous.

Q. Now, Detective, as relates to paragraph number eight, you personally, not someone else, met with the CI; is that correct?

A. That is correct.

Q. And, what was your purpose in meeting with him?

A. To make a controlled purchase of marijuana from Shadi Banna.

Q. And when you met with him, what happened?

A. We placed a phone call to a number in which the CI explained was Shadi Banna's number.

Q. Let me stop you there. Did you give the CI this number to call?

A. No.

Q. Is this the number that he dialed himself?

A. That's correct.

Q. And after he dialed this number, explain to the Court what exactly happened; what were you doing; what was he doing?

A. Arrangements were made to purchase marijuana from Shadi Banna at that address, 1434 Ridgewood.

Q. Now, did you hear a voice on the other end?

A. Yes.

Q. Was it a male voice?

A. Yes.

Q. You had never heard this voice before?

A. No.

Q. Okay. And, anywhere in paragraph number eight did you state that you personally know that it was Shadi banna, the Defendant on the other end of that telephone?

A. No.

Q. You never made that representation, did you?

A. No.

Q. Now, as it relates to paragraph number nine - - and, Detective, usually when you've done something, is it fair to say that in this affidavit it has affiant, meaning yourself, right?

A. Yes.

Q. Drawing your attention to paragraph number nine and it reads specifically that CI was searched and found free of drugs and money, you personally did not search him, did you?

A. Yes, I did.

Q. You personally searched the CI; is that correct?

A. Yes.

Q. And, did you personally give him money?

A. Yes.

Q. And it was recorded buy money with serial numbers recorded?

THE COURT: Miss Carr, please stay on direct. You're leading him on cross.

R. Did you give the CI anything?

A. Yes.

Q. What did you give him?

A. Buy money.

Q. Okay. Was there anything special about that buy money?

A. It was recorded and numbers were recorded.

Q. Who recorded it?

A. Either I did or Detective Escalante did.

Q. Okay. And, did you give the CI any instructions after you gave him this buy money?

A. Yes.

Q. What did you tell him?

A. CI was instructed to go to 1434 Ridgewood to complete the transaction of marijuana.

Q. Okay.

A. I was with the CI.

Q. Now, do you know if the CI was under surveillance?

A. Yes.

Q. Do you know who was performing the surveillance of the CI?

A. the members of the surveillance team.

Q. Okay. Were you in radio contact with the surveillance team?

A. Yes.

Q. Could you hear what was going on?

A. Yes.

Q. What could you hear?

MR. ZUKERMAN: Objection. Not in the affidavit, Your Honor.

THE COURT: May I see counsel at side-bar, please?

(Thereupon side-bar had off the record.)

R. So, Detective, the CI, he was in constant surveillance with the other team members?

A. That is correct.

Q. And, the CI returned to your vehicle?

A. That is correct.

Q. Okay. How long did it take for him to return to your vehicle?

A. Approximately ten minutes.

Q. Did you search him?

A. Yes.

Q. And, did you find anything?

A. Just what the CI handed me.

Q. What did he give you?

A. Approximately one ounce of marijuana.

Q. You personally tested it as contained in paragraph number ten?

A. Yes.

Q. You've tested other items?

A. Yes.

Q. You've been trained to do that?

A. Yes.

Q. It tested positive?

A. Yes.

Q. Now, as it relates to audiotapes, you testified on direct examination or examination from opposing counsel, defense counsel, that some audiotapes are in existence as it relates to the conversation or surveillance. Was that your testimony?

A. Yes. I think I did testify to that.

Q. But, you turned those tapes over to the prosecutor's office?

A. All evidence was turned over to the prosecutor's office; all audio evidence, audiovisual.

Q. Now, you don't work for the prosecutor's office?

A. That is correct.

Q. And, as it relates to the indictment, you don't type the indictments, do you?

A. That's correct.

Q. You have nothing to do with that, correct?

A. That's correct.

Q. So, if there is a - - is the date reflected in Counts 8 and 9 - - did you do any work on the 13th?

A. No.

Q. And if I showed you a calendar with the July calendar again, if July was on a Sunday, do you normally work on Sundays?

A. No.

Q. Okay. So, based upon your recollection and based upon your notes, the original controlled purchase as reflected in this indictment, what date did it actually occur?

A. The 18th.

Q. Okay. And, that is an error as it relates to the date. In looking at Counts 5 and 6, prior to today, had you ever heard of the drug, propoxipene?

A. Prior to today?

Q. Correct.

A. No.

Q. Okay. Is there a drug, propoxipene, that you're aware of?

A. No.

Q. Did you find out today there was another error in the indictment?

A. That is correct.

Q. But, you don't have anything to do with that, right?

A. That's correct.

Q. So, Detective Carney, it's your testimony that based upon information provided to you, everything in this affidavit is accurate?

A. That is correct.

Q. In reviewing this affidavit, did you see any misstatements?

A. No.

Q. Any falsifications?

A. No.

Q. Anywhere within these four corners, did you perform any acts or did you not perform any acts that are listed in this affidavit as being attributed to you?

A. No.

Q. Okay. So, when it says that you met with the CI, you actually met with him, right?

A. That is correct.

Q. And, everything in this affidavit is accurate?

A. That is correct.

Q. And, it was the basis for the search warrant?

A. That is correct.

Q. And, you followed all the policies and procedures?

A. Yes.

MS. CARR: Nothing further, Your Honor.

THE COURT: Thank you, Miss Carr. Mr. Zukerman?

MR. ZUKERMAN: Thank you, Your Honor.

RECROSS-EXAMINATION OF DAVID CARNEY

BY MR. ZUKERMAN:

Q. I need you to look at paragraph six, please. Paragraph six contains information which you allege to be true, correct?

A. That's correct.

Q. It's not complete, is it? I mean, you don't have in there that you spoke to Detective Todd Allen, do you?

A. No, there are no names in there.

Q. You don't have that you worked with Todd Allen thirty to fifty times before this incident?

A. That's correct.

Q. You don't have in there that Detective Allen told you that there was drug trafficking going on at this address, do you?

A. No.

Q. You don't have in it that anybody from Westshore Enforcement Bureau or Lakewood Narcotics, informed you that drug trafficking was going on at this place, do you?

A. No, not in those words.

Q. Not in any words. Where do the words, drug activity, marijuana, cocaine, anything, where is it in paragraph six, show me.

A. It doesn't say drug activity.

Q. Thank you. Doesn't have any dates, does it?

A. That's correct.

Q. We don't know what year this occurred in?

A. Paragraph six?

Q. Yes. Do we?

A. That's correct.

Q. What month?

A. Doesn't state the date.

Q. But, you said something interesting when Miss Carr asked you with whom did you speak you said, I spoke with Detective Todd Allen, correct?

A. That is correct.

Q. Now here you say Lakewood Narcotics and Westshore Enforcement Bureau agents. There is an S there; it's plural, right?

A. Yes.

Q. Today your testimony was that you spoke to Todd Allen, correct?

A. That's correct.

Q. Okay. And that's the truth, correct?

A. No - - that's the truth.

Q. That about which you testified was not true?

A. No.

Q. You lied to Judge Boyko?

A. No.

Q. You committed perjury?

MS. CARR: Objection, Your Honor.

THE COURT: Let him answer.

A. That's not correct.

Q. The testimony you just gave Miss Carr, which she elicited from you, was that you spoke to Todd Allen of the Lakewood Police?

A. I did speak to Todd Allen.

Q. You limited your answer to that, correct?

A. To the prosecutor, yes. That's in reference to paragraph four.

Q. I'm talking - - okay, you said you spoke to the prosecutor also?

A. No, when I answered her question.

Q. But, are you saying that you didn't truthfully and fully

answer her question?

A. I did truthfully answer her question.

Q. Did you now? Is it your testimony you didn't understand her question when she asked you?

A. No.

Q. She asked you to look at paragraph six; you recall that? Yes or no, sir, she asked you to?

A. I recall to look at paragraph four.

Q. No, she asked you to look at paragraph six.

A. Okay.

Q. She asked you with whom did you speak, correct?

A. I recall that from paragraph four.

Q. Okay, let's go to paragraph four. You say there you spoke to Lakewood Police Narcotics agents?

A. That's correct.

Q. You testified you just talked to one person, Todd Allen, correct?

A. That's who I spoke with.

Q. So, let's give you the benefit of the doubt, that you're only dealing with paragraph four. That contained in paragraph four is not correct; is it, sir?

A. I didn't put his name in there, no.

Q. But it says, agents. Doesn't just say one agent, does it?

A. That's correct, it's plural.

Q. These are your words, not mine.

A. That's correct.

Q. This is your testimony, not mine. So, would you agree with

me that the information that you swore to before Judge McDonnell is not correct, in paragraph four?

A. No, that is correct.

Q. so then you perjured yourself here?

A. No, I did not perjure myself.

Q. It says here, affiant contacted Lakewood Police. First of all, only one affidavit, affiant you?

A. That's correct.

Q. You testified you only contacted Todd Allen?

A. That's correct. That's who I spoke with.

Q. All right. Paragraph six, you offered no testimony here that you talked to anyone in Westshore Enforcement Bureau, correct?

A. No, I didn't offer testimony to that.

Q. Did you speak with anybody from Westshore Enforcement Bureau?

A. Yes.

Q. Who did you speak to?

A. I'm sure I spoke with Jeff Capretto.

Q. Who did you speak to?

A. It would be Jeff Capretto.

Q. What date?

A. I could not tell you the exact date.

Q. Again, you're guessing just like you were guessing you drove by the house on the day before the search, right?

A. I'm not guessing, no.

Q. What date did you speak to Jeff Capretto?

A. I couldn't tell you the day.

Q. What time?

A. I don't know, sir. I don't recall, sir.

Q. And, you told Judge Boyko that you learned information from these people that Shadi Banna was involved in drug trafficking, correct?

A. That's correct.

Q. That's pretty important piece of evidence to establish probable cause, don't you think?

A. Yes, sir.

Q. It's nowhere in your affidavit, is it?

A. It explains that he's familiar with previous investigations.

Q. It says nowhere about familiar with him about drug trafficking, does it?

A. Sir - -

Q. Yes or no.

A. It doesn't say the words, drug trafficking, no, sir.

Q. Thank you. Now, let's look at paragraphs three and four. Miss Carr asked you about the confidential informant and all that. You said you showed the confidential informant a picture of my client, correct?

A. That's correct.

Q. Is that in the affidavit?

A. No.

Q. There is nothing in the affidavit that establishes the identity of my client, is there?

A. That is correct.

Q. Thank you. Now, you said that - - in fact, there is nothing in that affidavit that shows that the confidential informant even knows Shadi Banna, is there? You said the informant knew Shadi Banna. There is nothing in here that says that she or he has personal knowledge of Shadi Banna, is there?

A. It states there is a marijuana trafficking business which is operated by Shadi Banna.

Q. Doesn't say this person knows Shadi Banna, does it? Yes or no?

A. No.

Q. Doesn't say this person has purchased marijuana from Shadi Banna in the past, does it?

A. That's correct.

Q. Doesn't say this person had witnessed any transactions at 1434 Ridgewood, does it?

A. No.

Q. Again, there is no reliability of this informant and verifiability of the information?

A. No, that is not in the affidavit.

Q. Doesn't say anything about them knowing about any drug activity at 1434 Ridgewood, correct? Correct?

A. Paragraph three.

Q. Excuse me, it doesn't say they have any personal knowledge about Shadi Banna selling marijuana from 1434 Ridgewood.

A. states that through their conversations and associations with Shadi Banna, they know that Shadi Banna sells marijuana from 1434 Ridgewood.

Q. Doesn't say they have ever purchased it from him, does it?

A. No. Indicates through associations.

Q. Or that marijuana has ever been sold there?

A. No, it's through the associations and conversations.

Q. It indicated that you - - I'm glad Miss Carr brought that up - - you never knew the CI before this, did you?

A. Before, before this case?

Q. Yes?

A. I don't understand. Is this the first case?

Q. Yes.

A. That's correct.

Q. So, you never knew if this was a reliable informant, did you, from your personal experience with this informant?

A. If the informant was reliable? We verified all the information.

Q. Sir, before this, you never knew if the informant was reliable?

A. I've not used the informant in the past.

Q. Ever?

A. No.

Q. You're the only affiant on this?

A. Correct, yes.

Q. You testified about what members of the Westlake Police Department said, correct, to Judge Boyko, you recall?

A. What members of the Westlake Police Department said?

Q. Correct, about the informant.

A. That anybody said anything about the informant, no.

Q. You're the only one who signed this affidavit, correct?

A. That's correct.

Q. Let's look at paragraph six again. You attributed to other people in your affidavit what other people do. For example, in paragraph six, you say that you attribute surveillance by said agents, said agents being Lakewood Narcotics and Westshore Enforcement Bureau. You attribute that to them, correct?

A. That's correct.

Q. If you look at paragraphs eight, nine, ten, eleven, you attribute none of that to anybody other than you, correct?

A. That's correct.

Q. So, if a Judge were reading this, they would only assume that you did all which is in paragraphs seven, eight, nine, ten, eleven and twelve, correct?

THE COURT: You don't have to answer that.

R. You don't attribute it to anybody else, do you? Yes or no.

THE COURT: You can answer that.

A. No. Those paragraphs, no.

Q. In fact, you didn't do everything in paragraphs seven, eight, nine, ten, eleven or twelve; did you, sir?

A. Paragraph nine, no.

Q. We don't have a tape of this telephone conversation?

A. That's correct.

Q. Miss Carr was asking you questions about the surveillance, the radio contact, about all the information about paragraph nine. But, then again, this was all done by other people, not

by you, correct?

A. The surveillance?

Q. The surveillance where somebody went to where somebody was alleged to have done something?

A. That's correct.

Q. And again, it's not in here that Shadi Banna didn't sell any drugs on July 18th, 2003, is it?

A. Hand to hand, no, sir.

Q. Well, that isn't even in here, is it?

A. Hand to hand, no, sir..

Q. And, it isn't here that somebody else sold the drugs, is it? Is it? It's not in there that somebody took the money, supposedly, from the CI, is it? Yes or no.

A. No.

Q. And, it isn't here somebody other than Shadi Banna gave the drugs, correct?

A. That's correct.

Q. And, it isn't even in here that this happened at 1434 Ridgewood Avenue, Lakewood, Ohio, is it? Paragraph nine says somebody, says that this person went to the above premises, right?

A. That's correct.

Q. But, there is nothing about what happened there at that time or from that time until that person returned to you, correct?

A. That's correct. Those words aren't in there.

Q. Nothing about the person going into the driveway, front door, back door, correct?

A. That's correct.

Q. Nothing about any visual contact between you or anybody else of this CI going to this house, correct?

A. It's incorrect. It says CI was kept in constant unbroken surveillance as they went to the above premises.

Q. As they went to the above premises, right?

A. That's correct.

Q. Doesn't say he went down the driveway, does it?

A. That's correct.

Q. Doesn't say he went, met with somebody?

A. Not the specifics.

Q. Not the specifics?

A. Exactly.

Q. Doesn't say that. Doesn't even say that the person went on the property, does it?

A. Says went to the above premises.

Q. It doesn't say he went to the house, knocked on the door, went to the back door, does it?

A. No.

Q. There are no specifics about what is alleged to have occurred there, are there? Yes or no. I take it by your silence - -

A. It explains - -

Q. Sir, yes or no. Please, you know, it's late. You've already admitted this before. Why do you have to try to change your testimony now?

MS. CARR: Objection, Your Honor.

THE COURT: He's asked the question. If he knows the answer, fine. If he doesn't, let's

move on.

R. Anything in here about what happened at that premises, yes or no?

A. No.

Q. Anything about him, this person being at that premises and doing anything at that premises?

A. No.

Q. Anything about that person leaving that premises?

A. No, not those words.

Q. Anything about what happened from the time somebody - - not you, but the reader would think it's you - - saw the person go to the above premises and the time that he or she showed up to your unit behind the Lakewood Police Department? Anything about that?

A. No.

Q. Miss Carr was talking to you about evidence and you said that all the evidence was turned over to the prosecutor. Did you personally turn the evidence over to the prosecutor? Yes or no.

A. Yes.

Q. Everything? Every piece of evidence?

A. Yes.

Q. Personally?

A. I brought everything down here.

Q. Nobody else did?

A. Detective Escalante was with me.

Q. Did you bring everything from Lakewood?

A. No.

Q. So, you didn't bring all the evidence down, did you?

A. All of Westlake evidence, yes.

Q. You didn't limit it to all of Westlake's evidence. You said you brought all the evidence down.

A. On our case, yes.

Q. You didn't bring all the evidence down?

A. I did not bring Lakewood's evidence down?

Q. And, audiotapes, you brought all the audiotapes down?

A. I brought everything that we have.

Q. Did you bring audiotape of the wired conversation between your CI and this person other than Shadi Banna between your CI and this person other than Shadi Banna who you say sold the drugs, did you?

A. Everything that we have was brought down.

Q. My question to you, sir, please, it's too complicated, tell me.

A. I cannot tell you.

MR. ZUKERMAN: Okay. Thank you, Your Honor. Thank you, Officer.

THE COURT: Miss Carr?

MS. CARR: Just briefly, Your Honor.

REDIRECT EXAMINATION OF DAVID CARNEY

BY MS. CARR:

Q. Detective, in looking at the search warrant again, as it relates to paragraph number two, looking at paragraph number two, the CI told you that the Defendant was operating,

specifically, a marijuana trafficking business, right?

A. Yes, that's correct.

Q. Okay. And, in looking at No. 4 and No. 6, Detective Allen or Todd Allen, he is, indeed, a police detective with the Lakewood Police Department, right?

A. yes.

Q. Okay. And, based upon your dealings with him, is it fair to say that he is, indeed, also a narcotics detective?

A. Yes.

Q. Is that correct?

A. Yes.

Q. So as it relates to previous investigations, what did you take that to mean?

A. Narcotics investigations.

Q. And, would that be because he's a narcotic detective?

A. Yes.

MR. ZUKERMAN: Objection, leading.

THE COURT: Sustained.

Q. And, why did you form that belief?

A. Because Detective Allen works narcotics and he works narcotics investigations. And, when we talk, that is the basis of what we talk about, narcotics investigations.

B. All the, our investigations have been narcotic related.

Q. Okay. Now, as it relates to paragraph number six, the Lakewood Narcotics Department and the - - I actually know them as WEB, Westshore Enforcement bureau, in any investigation, what is their role?

A. Basically, they're a support role.

Q. And, what does that support include?

A. They assist in surveillance, audiovisual at times.

Q. And, this was done in this case, right?

A. That's correct.

Q. So, even though it's not contained in this affidavit, you verified that the CI, by using a photo, knew Shadi Banna; is that correct?

A. That is correct.

Q. Okay. And, at no time did you represent - - drawing your attention to paragraph one, that you personally knew the CI, right?

A. That is correct.

Q. But you are a member of the Westlake Police Department, right?

A. Yes.

Q. And it was known to members of your department, Westlake?

A. That's correct.

Q. And again, as relates to this affidavit, there is no, as you've read through probably 500 times, there is no false information in here, correct?

A. That's correct.

Q. Everything is accurate based upon your investigation and your involvement in this investigation?

A. Yes.

MS. CARR: All right. Thank you, Your Honor.

THE COURT: Thank you, Miss Carr.

May I see counsel side-bar, please?

(Thereupon side-bar had off the record.)

THE COURT: We're adjourned at this point. See you back here in an hour.

Thank you.

(Thereupon Court adjourned.)

- - -

WEDNESDAY, JUNE 23, 2004

AFTERNOON SESSION

- - -

THE COURT: Before we hear final remarks on this motion, I believe we have to, Mr. Zukerman, I think we left off moving the exhibits into evidence?

MR. ZUKERMAN: Yes, I'm moving in Exhibit A. Any objection?

MS. CARR: No objection, Your Honor.

THE COURT: Okay. Miss Carr, anything on your behalf, as far as exhibits?

MS. CARR: No, Your Honor.

THE COURT: Okay. Mr. Zukerman, any final remarks?

MR. ZUKERMAN: Yes, sir. May I approach?

THE COURT: Sure.

MR. ZUKERMAN: Thank you, sir. May it please the Court, counsel, Larry Zukerman on behalf of Mr. Shadi Banna. Your Honor, at this point in time, the defense would respectfully move this Court to suppress the evidence seized from 1434 Ridgewood Drive, Lakewood, Ohio, on July 22nd, 2003, for two reasons:

First, Defendants contention that the affidavit is insufficient on all four corners; second, it's respectfully tendered that the testimony offered by Officer Carney is

tainted to such degree that those paragraphs which contained tainted evidence should be stricken and once stricken, the affidavit with remaining paragraphs, again, is insufficient to establish probable cause.

In putting this in proper context, the Constitution is probably the most important piece ever written by our forefathers. It sets forth our liberties, because what rights we have, why our forefathers came to our country, the liberties that we cherish so dearly, over the years there has been an erosion of those liberties. And, the 4th Amendment does provide that warrants can be issued based upon probable cause.

The Supreme Court has addressed this issue about probable cause. It's a fluid concept, but one thing that the Supreme Court stressed in Gates, it said, Courts must continue to conscientiously review the sufficiencies of affidavits on which warrants are issued. We've become a mill operation in this court here. I've seen judges come out, say, officer, raise your right hand, you swear? I swear. And, sign the paper without even reading the affidavit. We see this constantly. It troubles me to the point where I've just asked Judge Burnside to introduce a local rule instituting search safeguards.

It's troublesome that some of our Constitutional rights are treated so frivolously. And, I'm not casting that upon this Court, aspersion upon this Court or Judge Nancy McDonnell. What I'm saying is just things I've seen throughout my tenure in the court.

What we have here, we have a certain situation where an affidavit, truly on its face, is insufficient, everything in there. Let's say that there are no material omissions. Let's say that everything is truthful. It's insufficient. There is no

identification of my client. There is no identification of his voice. There is no identification that this is the person with whom the confidential informant spoke. There has been no reliability of this confidential informant, no veracity of the confidential informant.

There has been no observations of any sales at 1434 Ridgewood. There has been no observations of Shadi Banna at 1434 Ridgewood. In fact, what we have here is the contrary from the testimony. Let's say there was a sale. And, again, we have nobody here to establish that the informant went on the property, went to a door, went to the back door, was met by a person. There was an exchange, left and witnessed going back to the police station whereupon Officer Carney seized marijuana. I mean, there is a huge gap here. It's an important gap. Again, we're basing this upon a piece of paper. We are stripping somebody of their civil liberties upon a piece of paper, upon sworn-testimony in a piece of paper. That's all it is. It's a piece of paper. Our system relies on a piece of paper which can strip somebody of their Constitutional rights.

The 4th Amendment, if somebody just says, I do, it's true. And, I respectfully tender to you, Your Honor, if somebody is stripping somebody of their civil liberties based upon a piece of paper, it better be in there.

Pinky Carr, I admire greatly - - wonderful person, great litigator, an honorable human being, brought out testimony from the officer - - well, this is only the third or fourth affidavit that you prepared. Who cares? I say, with all respect, who cares? It doesn't matter. It doesn't matter. It's a litmus test. So, if it's only his fourth time, he did it wrong. If it's his third time, he did it wrong. It wasn't right. We can't strip somebody of their liberties because, oh, well, I jut didn't get it right. I didn't include all the facts. We don't

have in everything casually related, sorry.

Sorry doesn't work in this circumstance, Your Honor. The remedy is suppression. It's the only remedy. Nobody observed Shadi Banna. And, again, if you read this affidavit, paragraph six attributes two others, what they say they did and/or observed.

Again, none of it involves narcotics, sales of narcotics, possession of narcotics and/or any narcotics at 1434 Ridgewood. But, let's just say, for instance, Officer Carney is being a hundred percent truthful in paragraph six. He's attributing two others, what others did.

And then, if you read from there, it says, affiant and then it moves onto what happened; within the past twenty-four hours, CI was searched; affiant tested everything there, when you read it, it's as though he witnessed it. And, he didn't. He didn't. He didn't witness it. He doesn't attribute it to others.

When we talk about CI provided with money, was kept in constant, unbroken surveillance as he went to the above premises, it's as, he wrote it as if he did it and he didn't do it. And then there's huge gap of ten minutes. What happened? We don't know what happened. There is no nexus between paragraph eight and what happened at the above premises. We don't even know if the person went on the property. We don't even know if the person went off the property. We don't know if the person went back to the Lakewood Police Department. We don't know where the person went. There is nothing in this affidavit to establish, even remotely, that there are any drugs at 1434 Ridgewood or Shadi Banna had anything to do with it.

In fact, conversely - - and this, I think, is absolutely the most frightening and upsetting, to me, aspect of this is,

call it whatever you will, call it a misstatement of fact, call it a slanting effect, call it putting their spin on it - - I call it a lie; I call it a lie when you make material misrepresentations like this; this is a lie, when you know something not to be true. I mean, they're telling Judge McDonnell that Shadi Banna is selling drugs out of 1434 Ridgewood.

Well, what do we have here? We have here that some girl - - let's say that the CI told him this and let's say the CI is being truthful. We know, we're hoping two things and we're hoping that his memory of what happened is truthful, because we know that his memory of, you know, in one instance he's saying he drove past the house, examination by Miss Carr. Then on the other hand, on my examination, he doesn't have a recollection of doing that. But, it's okay when he's saying it for the State, when he's saying it for the State it happened, right? He said, oh, yes, I drove by the house. I did drive by the house. When I was questioning him, you don't have a recollection of driving by the house? No, I don't.

So, assuming that the CI is telling the truth and we can't verify that. We can't verify that because there is nothing in the affidavit to do so, right? We don't have anything to verity whether she went or he went and with whom the person met. Nothing like that. But, if you would have him, this affidavit, if you would permit it to stand, then it's okay to lie. It's okay to create an inference in a judge that Shadi Banna sold the drugs.

The only inference you can get from this, the only reasonable inference you can get from this is that somebody went in that house and bought the drugs from him. That's it. That's the only reasonable conclusion one can come to. And, Officer Carney takes the stand and says something different. It wasn't him. I mean, how outrageous is that? How

menacing is that that we can strip somebody of their constitutional rights. By the way, we don't have to tell the truth and we don't even have to include the truth. And, we can put the facts however way we wish.

It's frightening. We're living in frightening times today, Your Honor. We have the Patriot Act, all these erosions of our civil liberties and our rights and, wow, this just blows my mind. In my years of practice, I've never seen anything like this. And, thank God, Mary McGrath told me the truth because otherwise this never would have come to light. Never came to light any other way.

Call it what you will, a mistake - - I call it a lie. These have to be stricken from this affidavit. And, this evidence has to be suppressed because, again, Your Honor, our liberties are too precious to be based upon thresholds so low to begin with, but then we're going to be able to put a spin on it; we're going to be able to mislead the judge about what happened, put in there inferences that are absolutely wrong. Is this okay?

If you should not grant the motion to suppress, you'd be saying to the Westlake Police, the city civilians and the State of Ohio, it's okay for you to come up here and lie about this. It's okay for you, Police Officer Carney, to accuse somebody of doing something when you know it wasn't him. It's okay not to put the facts in the affidavit. It's okay.

And, Judge, it's not okay. It's not okay. It's not okay to load an inference in the affidavit that you witnessed all of this, that you kept the CI in constant and unbroken surveillance as she went into the above premises. It's not okay. It's not okay. You can't do it. There has got to be a line. And, I think they've crossed it. And, I think the evidence has to be suppressed.

If I'm being a bit emotional, yeah, I am, because I'm very emotional about the constitution, very emotional about civil rights and, I mean, this is why I do what I do. It's checks and balances, Your Honor. It's making sure that the right thing is done. It's sending a message out saying it can', you can't lie in an affidavit or can't slant the facts, can't omit material facts. You can't make a judge believe you saw something that you didn't see. And that even if somebody, some of this stuff is in here, the fact is that you have no identification of the client. The affidavit doesn't include identification of the CI, of my client or the police officer's identification of my client, of his voice, nothing like that. So, we have no identification.

We have nothing in there saying this person has ever purchased any drugs or anything from his, the premises, before this occasion. And, certainly, nothing in the affidavit that on July 18th, 2003, that anybody purchase anything, any drugs at all from anybody at the premises. There is no nexus. There is nothing to tie it together. And, Your Honor, if there ever was a case where evidence had to be suppressed based upon insufficiency of the affidavit, for every reason I delineated, this is it.

I think you for your time.

THE COURT: Thanks, Mr. Zukerman.

Miss Carr?

MS. CARR: Thank you, Your Honor. Your Honor, in the case of State versus Green, 1989 case, 45 Oh.St.3d, 325, Court, in that case, ruled that in reviewing the sufficiency of probable cause in an affidavit, submitted in support of a search warrant issued by a magistrate, neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by

conducting de novo determination as to whether the affidavit contains sufficient probable cause.

And, doubtful or marginal cases in this area should be resolved in favor of upholding a warrant.

Your honor, I submit to you that the basis for this motion to suppress is that there are inaccurate or incorrect statements contained in this affidavit; that further, Your Honor, that the affidavit or search warrant would have been issued just on these four corners.

I submit to you, Your Honor, that it, in looking at the standard outlined in Franks, the issue is or the standard is whether or not the affiant, in this case, Detective Carney, knowingly or recklessly made false statements with disregard of truth.

Your Honor, I submit to you that each and every statement contained in here is the truth. There are no misstatements. There are no false statements. From the dour corners of this affidavit, from these five pages, Your Honor, four pages, I'm sorry, Your Honor, we learned that there is, that the Defendant sells marijuana not just from any address out of the clear, blue sky, but the 1434 Ridgewood residence, from his Ridgewood residence in Lakewood, Ohio.

Your Honor, we also learned that, through the Lakewood narcotics detectives, that this Defendant is known to them from previous investigations, Your Honor, through a computer check. Those are all terms contained in the four corners, that this is the address that coincidentally is listed for the Defendant as far as 1434 Ridgewood. That's his address and the CI reported that this Defendant conducts a marijuana business from this location; specifically, that this Defendant, Shadi Banna, sells marijuana from his 1434 Ridgewood residence.

Your Honor, we learned that through surveillance that there was pedestrian traffic that would enter and leave within a short stay; that based upon their experience, that that's usually indicative of drug trafficking. We also learned, Your Honor, through this affidavit, that a telephone call was made to a person who the CI purported to be Shadi Banna, a controlled buy was arranged and that the CI was given a certain amount of money. He was searched prior to being given this money and that after he had left, he was under surveillance.

It doesn't say that the affiant, Detective Carney, saw him go. It said he was under surveillance and that he was observed going to the premises. The above premises is 1434 Ridgewood in Lakewood, Ohio. And, that after about ten minutes, he returned. The CI was again checked and the only thing he had on him was marijuana. And, that marijuana was ultimately tested by Detective Carney and it tested positive.

Your Honor, I submit to you that looking at the four comers of this affidavit alone, there was probable cause for this search warrant. That search warrant was based upon information that the affiant in this case, Detective Carney, either seen from firsthand knowledge or in conjunction with the other detectives investigating this matter.

Your Honor, I don't think that this is anything out of the ordinary. Things like this occur everyday. This is not a unique situation, Your Honor. I do not believe that there is any grounds whatsoever to grant the motion to suppress, that the affidavit clearly supports the basis for the search warrant and as case law dictates, even if we assume that there is minor error in here, as I've already represented, there are no untruths. The wording is different, but there is nothing inaccurate. There is no lie contained in this affidavit whatsoever.

But, even if the Court was to view say, the wording, everybody has their own style. Everybody may communicate something differently. Somebody could say something one way; the other person may say it another way. But, no matter how it was represented, there was no misrepresentation; that just looking at the four corners, that there was probable cause and that the Defendant's motion to suppress should be denied.

THE COURT: Thank you, Miss Carr. Mr. Zukerman, you want to have a final comment?

MR. ZUKERMAN: Again, you have to look at this in the context in which it's written, Your Honor. There are misrepresentations. They're material. There are omissions that are material and there are just gaps, inexcusable gaps. As such, for all the reasons I've stated in my argument and in briefs, we feel that the evidence should be suppressed.

Thank you, sir.

THE COURT: All right, thank you. We'll have a short adjournment so I can review this; come back with my decision.

(Thereupon a short recess was had.)

THE COURT: We're back in Case No. 441689. All right, the issue before the Court is whether I should grant the motion to suppress. Let me go through some of my thoughts after what I've heard and what I've reviewed regarding this motion.

We have to look at the four corners of the affidavit to determine whether there is probable cause to issue a warrant and whether the testimony that we've heard lines up with what the warrant purports to be.

Starting from the beginning here, I will pout out some of the things that I find troubling. Look at paragraph one, regarding CI, confidential informant. It says, confidential informant is known to the Westlake Police Department. Is known as what? A liar? A thief? A child rapist. I'm not sure what that means.

What is even more troubling that that, there is absolutely nothing to indicate whether the CI is reliable. Nothing. Nothing. Whether he's been used in the past, whether the affiant has any personal knowledge of this or whether Westlake Police Department can vouch for his reliability and credibility so that he can provide credible information regarding the Defendant. The affiant is allowed to rely upon other police officers, law enforcement officials to prepare the affidavit and to assist in making this affidavit and gathering information for the affidavit. But, it has to be done in such a way as to identify the nature of this information, how credible it is, how verifiable it is.

Law ~~says you're~~ allowed to do that. If you do it, you have to do it right. Again, I find a huge problem with no indicia at all of reliability of this CI. CI states there is currently a marijuana trafficking business at the above location; that Shadi Banna lives at Ridgewood Avenue in Lakewood. Through his or her association and conversations with Shadi Banna, CI knows the following. Again, how do you know this? How do you know the CI is reliable and truthful? Based upon what? I don't that.

Affiant's contacted Lakewood Police narcotic agents and learned that Shadi Banna is familiar to the from previous investigations. Again, what does that mean? I'm left to speculate as to what previous investigations and how it is "familiar" to them. What does that mean, drug activity? I don't know. Again, you're just, by the facts that are there,

you're forced to assume it's drug activity but we're looking for facts, not assumptions and inferences.

Number five, they used driver's license information to find the address - - that's not the main problem here. It's questionable, but that's not the real issue here.

Affiant contacted Lakewood Narcotics and Westshore Enforcement Bureau and shared the above information. Surveillance was conducted by said agents who observed Shadi Banna on the above-described premises. So, you observed him on the premises. And further observed pedestrian traffic entering said premises and leaving after a short stay. There is no nexus as to whether he's on the premises at that time and whether people are coming and going at the time that he's there. That may be the case. It's not there. It's not there.

So, there is no indication that he was even present at the time the pedestrian traffic is coming and going. There is no time.

In affiant's training and experience, this is indicative of drug trafficking at the above premises. It may be. That may be. We know that, based upon our experiences that people coming and going on the premises is an indication of or could be an indication of drug activity. But, when? At the time that Shadi Banna was there? If that was the case, it should have been stated.

CI was met for purposes of making a controlled purchase. We don't know, again, who the CI talked to. We heard from the stand the detective said that CI talked to Shadi Banna. It's not here. Again, it's going outside the affidavit for information. He couldn't identify Shadi Banna over the phone wire; had to rely on the CI who told him it was Shadi Banni. That's what we heard on the stand. That's not in the

affidavit. And, who the arrangements are made with doesn't appear in the affidavit.

Arrangements were made, leads us to speculate who they were made with - - his sister, mother, I don't know.

CI was searched and found free of drugs and money. Nothing wrong with that. Acting on instructions, CI was kept in constant and unbroken visual surveillance. I think we're led to believe, I would believe that Judge McDonnell was led to believe that this was personal observation. But, this was from another officer. That, we've learned. That was not stated in here.

Again, you can rely on our law enforcement officers to help you with the information and the affidavit but it's got to be stated as to who is doing what and based upon what, so there is no unbroken chain.

Within ten minutes, CI returned to a prearranged location. This is very troubling because we learned from the stand that CI drove a vehicle. What is in the vehicle, more drugs? We don't know what is in that vehicle. There is no indication of who was watching the CI during this period of time.

It may be part of the team. Again, this is not stated. There is, it's a broken nexus there. No one can place Shadi Banna at the residence July 18th. Never spoke to Shadi Banna, didn't recognize his voice.

Paragraphs eight and nine, no time, no sufficient nexus between paragraphs eight and nine between the arrangements and the purchase from Shadi Banna. The officer testified that nothing was left out of the affidavit. We know that's not true. There is plenty left out. And, I believe his testimony, for the most part, was truthful and credible in the sense of all these things happening "behind the scene."

Facts that we found out, through this hearing, that were not listed in the affidavit that had they been placed in the affidavit, would have been sufficient for the issuance of the warrant.

I don't think there is anything intentional, I'm not going to read into that. I don't think that was the officer's intention. I found him to be pretty credible when he testified. We do know there is a big discrepancy and gaping holes in that affidavit. And, Judge McDonnell, I think she's reading this a first person all the way through. We found out that's not the case; that we have to have the identification of law enforcement officers to certain periods of time. And, it's inconsistent as to when he's acting in first person and when he's relying on law enforcement officers to do part of the work.

Bottom line, even if you look at the evidence as stated, it's not enough to place him at that place of 1434 selling marijuana. Based upon the affidavit and based upon obvious discrepancies in the testimony, things that were left out, things that could have been placed in here that would have made a sufficient affidavit and as Mr. Zukerman pointed out, the threshold is very low, we're talking about probable cause, more probable than not, what I find here is to be, at best, equivocal. Based upon the testimony that I heard, it's equivocal.

And, I'll start with that CI. If you're going to use a CI, better have something in here that says this person is reliable, based upon law enforcement officers vouching for him or her or based upon previous dealings with the CI, when you're using a CI - - never identified, never identified.

I realize that law enforcement officers have to work with CI's to get things done. It's done all the time. Without

them, probably half the arrests would not occur. But, the fact of the matter is, there has to be some reliability on the CI. That's a huge issue with me - - some reliability.

I pointed out the things - - gaping holes, no nexus to Shadi Banna with the sale or possession of drugs. So, motion granted. Evidence is suppressed.

CERTIFICATE

I, Jeniffer L. Tokar, Official Court Reporter for the Court of Common Pleas, Cuyahoga County, Ohio, do hereby certify that as such reporter, I took down in stenotype all of the proceedings had in said Court of Common Pleas in the above-entitled cause; that I have transcribed my said stenotype notes into typewritten form, as appears in the foregoing Transcript of Proceedings; that said transcript is a complete record of the proceedings had in the trial of said cause and constitutes a true and correct Transcript of Proceedings had therein.

_____

Jeniffer L. Tokar, RMR

Official Court Reporter

Cuyahoga County, Ohio